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# LEASEHOLD UNCONSCIONABILITY: *Caveat Lessor*

*If [a landlord] chose to stand on his right, the tenants must be taught, by the strong arm of the law, that they had no power to oppose or resist. . . . [P]roperty would be valueless and capital would no longer be invested in cultivation of the land if it were not acknowledged that it was the landlord's undoubted, indefeasible, and most sacred right to deal with his property as he list.*

—Henry Lord Brougham, defending the right of English landlords to evict Irish tenants due to non-payment of rent during the potato famine in Ireland. *Speech in the House of Lords, March 23, 1846.*

## I. Introduction

In recent years, the law concerning the landlord-tenant relationship has changed radically.<sup>1</sup> Legislation aimed at improving the position of the tenants has become common. Tenants have won the statutory right to obtain delivery of possession at the beginning of their terms, to sublease or assign, to imply a warranty of habitability, to hold landlords liable for injuries caused by their negligence, and even to procure a lease written in plain English.<sup>2</sup>

Most recently, tenants have been given another weapon to use against overreaching landlords—the right to petition a court to declare a lease or any of its clauses unconscionable and, hence, unenforceable.<sup>3</sup> New York's Real Property Law 235-c became effective July 26, 1976 and applies to all leases, regardless of when they were executed.<sup>4</sup> The statute reads:<sup>5</sup>

1. If the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made the court may refuse to enforce the lease, or it may enforce the remainder of the lease without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

2. When it is claimed or appears to the court that a lease or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

The New York statute is similar to section 1.303 of the Uniform

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1. See text accompanying notes 43-48 *infra*.

2. N.Y. REAL PROP. LAW §§ 223-a, 226-b & 235-b (McKinney 1968 & Supp. 1978); N.Y. GEN. OBLIG. LAW §§ 5-321 & 5-702 (McKinney 1978 & Supp. 1978).

3. N.Y. REAL PROP. LAW § 235-c (McKinney Supp. 1978).

4. 1976 N.Y. LAWS, ch. 828, § 2.

5. N.Y. REAL PROP. LAW § 235-c (McKinney Supp. 1978).

Residential Landlord and Tenant Act<sup>6</sup> (URLTA) which has been adopted by several states.<sup>7</sup> A major difference between the two statutes is that the URLTA provision applies only to leases of residential premises<sup>8</sup> while section 235-c has no such restriction.<sup>9</sup>

Section 235-c codified a common law theory of leasehold unconscionability which the New York courts had been evolving since 1970.<sup>10</sup> One court noted that "the power of Judges to declare unen-

6. UNIFORM RESIDENTIAL LANDLORD & TENANT ACT § 1.303 [hereinafter cited as URLTA], which reads:

(a) If the court, as a matter of law, finds

(1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result; or

(2) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

(b) If unconscionability is put into issue by a party or by the court upon its own motion the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

*Id.*

The URLTA was approved by the National Conference of Commissioners on Uniform State Laws in 1972. For a discussion of the Act, see Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, *Proposed Uniform Residential Landlord & Tenant Act*, 8 REAL PROP., PROB. & TR. J. 104 (1973) [hereinafter cited as Proposed URLTA]; Strum, *Proposed Uniform Residential Landlord & Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP., PROB. & TR. J. 495 (1973).

7. See ARIZ. REV. STAT. ANN. § 33-1312 (1974); FLA. STAT. ANN. § 83.45 (West Supp. 1978); HAW. REV. STAT. § 521-75 (1976); 1978 Iowa Laws 501; KAN. STAT. ANN. § 58-2544 (Weeks 1976); KY. REV. STAT. ANN. § 383.555 (Supp. 1978); MONT. REV. CODES ANN. 42-411 (Supp. 1977); NEB. REV. STAT. § 76-1412 (1976); N.M. STAT. ANN. § 70-7-12 (Supp. 1975); OHIO REV. CODE ANN. § 5321.14 (Page Supp. 1978); OR. REV. STAT. § 91.735 (1977); TENN. CODE ANN. § 64-2814 (1976).

Alaska and Virginia, which have adopted portions of the URLTA, did not adopt section 1.303.

8. URLTA § 1.201.

9. When the New York statute was first introduced as a bill, it applied only to "a lease of a residential unit." Senate Bill 253/Assembly Bill 272 (Jan. 8, 1975). This limitation was deleted in committee.

10. See, e.g., *Tai on Luck Corp. v. Cirota*, 35 A.D.2d 380, 316 N.Y.S.2d 438 (1st Dep't 1970), *appeal dismissed*, 29 N.Y.2d 747, *motion for reconsideration of dismissal denied*, 29 N.Y.2d 868 (1971); 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. T. 1st Dep't 1972), *leave to appeal denied*, N.Y.L.J., Oct. 18, 1972, at 2, col. 1 (A.D. 1st Dep't); *Seabrook v. Commuter Hous. Co.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. N.Y. 1972), *aff'd on other grounds per curiam*, 79 Misc. 2d 168, 363 N.Y. S.2d 566

forceable unconscionable clauses will increasingly prove to be a constructive remedial device against the more flagrant excesses . . . in our complex society. . . ."<sup>11</sup> Some of the pre-section 235-c decisions cited the Uniform Commercial Code (U.C.C.) provision on unconscionability as authority for refusing to enforce certain lease clauses.<sup>12</sup> Others relied on the court's equity powers.<sup>13</sup> One court relied on New York City's Consumer Protection Law.<sup>14</sup>

However they substantiated their decisions, the lower New York courts were not hesitating to engraft the doctrine of unconscionability into the law of landlord-tenant. Nevertheless, a need for statu-

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(App. T. 2d Dep't 1973); *Steinberg v. Carreras*, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (Civ. Ct. N.Y. 1973), *rev'd on other grounds*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (App. T. 1st Dep't 1974); *SKD Enterprises, Inc. v. L & M Offset, Inc.*, 65 Misc. 2d 612, 318 N.Y.S.2d 539 (Civ. Ct. N.Y. 1971).

11. *SKD Enterprises, Inc. v. L & M Offset Inc.*, 65 Misc. 2d 612, 615-16, 318 N.Y.S.2d 539, 543 (Civ. Ct. N.Y. 1971).

12. *Seabrook v. Commuter Hous. Co.*, 72 Misc. 2d 6, 8-9, 338 N.Y.S.2d 67, 70-71 (Civ. Ct. N.Y. 1972); *SKD Enterprises, Inc. v. L & M Offset, Inc.*, 65 Misc. 2d 612, 615, 318 N.Y.S.2d 539, 543 (Civ. Ct. N.Y. 1971).

UNIFORM COMMERCIAL CODE § 2-302 [hereinafter cited as U.C.C.] reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

*Id.*

13. *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 354, 335 N.Y.S.2d 872, 873 (App. T. 1st Dep't 1972); *Weidman v. Tomaselli*, 81 Misc. 2d 328, 334-35, 365 N.Y.S.2d 681, 689-90 (Rockland County Ct.), *aff'd mem.*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (App. T. 2d Dep't 1975). The trial court in *Weidman* specifically stated that U.C.C. § 2-302 was inapplicable to leases of real property. 81 Misc. 2d at 334, 365 N.Y.S.2d at 689.

In its report on the URLTA, the American Bar Association Subcommittee on the Model Landlord-Tenant Act of Committee on Leases concluded that URLTA § 1.303 "is merely a codification of the powers an equity court has always possessed." *Proposed URLTA, supra* note 6, at 107 n.13. See *Berger, Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 811 (1974) [hereinafter cited as *Berger*].

14. *Yengel v. Martiniez*, N.Y.L.J., Apr. 9, 1975, at 21, col. 4 (Civ. Ct. N.Y.). For similar decisions, see *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977); *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974).

New York City's Consumer Protection Law reads: "No person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts." NEW YORK, N.Y. ADMIN. CODE ch. 64, tit. A, § 2203d-1.0.

tory authorization was seen.<sup>15</sup> The New York Court of Appeals had never considered the theory of leasehold unconscionability<sup>16</sup> and the appellate departments apparently were split.<sup>17</sup> Therefore, the legislature enacted section 235-c, codifying what many courts already had recognized.

This Comment shall explore the principle of unconscionability as it applies to leases of real property, outline the types of lease clauses which have been held unconscionable to date, set forth other areas where the courts may apply the theory of leasehold unconscionability, and point out several issues which courts must face in construing section 235-c. It must be made clear, however, that there is very little authoritative case law in the area of leasehold unconscionability. The New York appellate courts, with a few exceptions, have not considered the issue. Nor has there been much judicial consideration of the URLTA provision.

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15. Memorandum of Assemblyman Edward H. Lehner, NEW YORK STATE LEGISLATIVE ANNUAL 286 (1976).

16. The court of appeals dismissed an appeal from *Tai on Luck Corp. v. Cirola*, 35 A.D.2d 380, 316 N.Y.S.2d 438 (1st Dep't 1970), because the appellant had requested a stipulation for judgment absolute from the appellate division. 29 N.Y.2d 747, *motion for reconsideration of dismissal denied*, 29 N.Y.2d 868 (1971).

17. The first department did not question the right of a court to declare unconscionable a lease provision. See *George Backer Mgt. Corp. v. Acme Quilting Co.*, 55 A.D.2d 535, 389 N.Y.S.2d 111 (1st Dep't 1976), *appeal dismissed*, 40 N.Y.2d 1092 (1977); *New York Merchandise Co. v. 23rd Street Properties*, 49 A.D.2d 849, 373 N.Y.S.2d 867 (1st Dep't) (mem.), *motion for leave to appeal denied*, 38 N.Y.2d 707 (1975); *Tai on Luck Corp. v. Cirola*, 35 A.D.2d 380, 316 N.Y.S.2d 438 (1st Dep't 1970), *appeal dismissed*, 29 N.Y.2d 747, *motion for reconsideration of dismissal denied*, 29 N.Y.2d 868 (1971); 57 E. 54 *Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. T. 1st Dep't 1972), *leave to appeal denied*, N.Y.L.J., Oct. 18, 1971, at 2, col. 1 (A.D. 1st Dep't).

The second department was more hesitant in holding lease provisions unconscionable. See *Rodriguez v. Nachamie*, 57 A.D.2d 920, 395 N.Y.S.2d 51 (2d Dep't 1977) (mem.); *Seabrook v. Commuter Hous. Co.*, 79 Misc. 2d 168; 363 N.Y.S.2d 566 (App. T. 2d Dep't 1973), *aff'g* 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. N.Y. 1972). *But see* *Weidman v. Tomaselli*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (App. T. 2d Dep't) (mem.), *aff'g* 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Rockland County Ct. 1975). The second department has been equally hesitant even after passage of section 235-c. See *Lefrak v. Lambert*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (App. T. 2d Dep't 1978) (per curiam), *modifying* 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct. N.Y. 1976); *Pine Hill Assocs. v. Malveaux*, 93 Misc. 2d 63, 403 N.Y.S.2d 398 (App. T. 2d Dep't 1978), *rev'g* 89 Misc. 2d 234, 391 N.Y.S.2d 58 (Yonkers City Ct. 1977). See also decisions of the second department considering U.C.C. § 2-302: *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (App. T. 2d Dep't 1969) (per curiam), *rev'g* 55 Misc. 2d 1080, 287 N.Y.S.2d 565 (Civ. Ct. N.Y. 1968); *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 2d Dep't 1967) (per curiam), *rev'g* 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau Dist. Ct. 1966).

## II. The Theory of Unconscionability

The principle that unconscionable agreements will not be enforced is an ancient one.<sup>18</sup> Roman law allowed for the rescission of contracts due to the inadequacy of the price.<sup>19</sup> During the Middle Ages, legal scholars and theologians developed a theory whereby exaction of unjust prices was forbidden.<sup>20</sup> The French Civil Code gave courts the power to nullify contracts on grounds of unconscionability.<sup>21</sup>

As early as 1750, an unconscionable bargain was recognized as a form of fraud by an English court.<sup>22</sup> In 1870, the United States Supreme Court carried the principle one step further and held that, even absent a showing of fraud, an unconscionable contract was unenforceable at equity.<sup>23</sup> While courts of equity refused to enforce unconscionable agreements, courts of law did not create a rule against unconscionability nor did they bar a common law action to enforce an unconscionable agreement.<sup>24</sup>

The U.C.C. empowered courts, as a matter of law, to determine whether a contract or a clause in a contract is unconscionable.<sup>25</sup> The Official Comment to the Code's unconscionability provision indicates that case law inspired the provision.<sup>26</sup> Thus, while section 2-302 of the U.C.C. can serve as an aid in deciding leasehold unconscionability cases, it should be remembered that the Code is not the only source of the doctrine of unconscionability.<sup>27</sup>

None of the unconscionability statutes define an unconscionable agreement.<sup>28</sup> The fact that the U.C.C. does not define unconsciona-

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18. Comment, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TULANE L. REV. 193 (1967).

19. CODE 4.44.2.

20. Comment, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TULANE L. REV. 193, 194 (1967).

21. C. Civ. arts. 1131 & 1133.

22. *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750). See 1 J. STORY, EQUITY JURISPRUDENCE § 188 (13th ed. 1886).

23. *Scott v. United States*, 79 U.S. (12 Wall.) 443, 445 (1870).

24. 1 A. CORBIN, CONTRACTS § 128 (1963).

25. U.C.C. § 2-302. See note 12 *supra*.

26. U.C.C. § 2-302, Comment 1.

27. Berger, *supra* note 13, at 811.

28. Of the states that have adopted the URLTA, only Kentucky has defined "unconscionable": "an act or conduct which is wilful and is so harsh and unjust as would be condemned or considered to be wrongful and would be shocking to the conscience of honest and fair-minded people." KY. REV. STAT. ANN. § 383.545(16) (Supp. 1978).

bility has been called the "greatest strength" of the doctrine of unconscionability.<sup>29</sup> The New York legislature never intended to define unconscionability since to do so would limit its application.<sup>30</sup>

Several courts have attempted to define an unconscionable agreement. The classic definition, formulated by Lord Hardwicke in *Earl of Chesterfield v. Janssen*,<sup>31</sup> is a bargain "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other. . . ."<sup>32</sup> In one of the first decisions to consider U.C.C. section 2-302, the court stated that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."<sup>33</sup> The *Restatement of the Law of Property*

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URLTA § 1.403, however, sets forth certain prohibited lease provisions:

(a) A rental agreement may not provide that the tenant:

- (1) agrees to waive or forego rights or remedies under this Act;
- (2) authorizes any person to confess judgment on a claim arising out of the rental agreement;
- (3) agrees to pay the landlord's attorney's fees; or
- (4) agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.

(b) A provision prohibited by subsection (a) included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover in addition to his actual damages an amount up to [3] months' periodic rent and reasonable attorney's fees.

*Id.*

29. Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 ARIZ. L. REV. 372, 383 (1968); T. QUINN, *UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST* § 2-302(A)(1)(1978); *But see* Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487-88 (1967); King, *Suggested Changes to the Uniform Commercial Code—Sales*, 33 ORE. L. REV. 113, 115 (1954) in which the authors suggest that the failure of the Code to define unconscionability is a weakness, not a strength. California refused to enact section 2-302 when it adopted the Code because it was felt giving such power to courts without a workable definition of unconscionability would have an adverse effect on commercial activity. California State Bar Committee on the Commercial Code, *The Uniform Commercial Code*, 37 CALIF. ST. B. J. 119, 135-36 (1962).

30. *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140, 143, 340 N.Y.S.2d 268, 272 (Civ. Ct. N.Y. 1973).

31. 28 Eng. Rep. 82 (Ch. 1750).

32. *Id.* at 100. *See* Hume v. United States, 132 U.S. 406, 411 (1889); Greer v. Tweed, 13 Abb. Pr. (n.s.) 427, 429 (C.P. 1872); 1 J. STORY, *EQUITY JURISPRUDENCE* § 188 (13th ed. 1886); BLACK'S LAW DICTIONARY 1694 (4th rev. ed. 1968).

33. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Because the case was decided prior to the effective date of the U.C.C. in the District of Columbia, the decision was based on common law but the court noted that it was taking U.C.C. section 2-302 into consideration. *Id.* at 448-49.

defines an unconscionable agreement as one which "would shock the conscience if enforced."<sup>34</sup>

The Official Comment to the URLTA states that the test a court should apply in deciding if a clause in a lease is unconscionable is "whether, in light of the background and settling of the market, the conditions of the particular parties to the rental agreements . . . are so one-sided *as to be unconscionable* under the circumstances existing at the time of the making of the agreement. . . ."<sup>35</sup> The Official Comment to the U.C.C. provides for a similar test.<sup>36</sup> Thus, both comments set forth an 'unconscionable' standard as a test for determining unconscionability. Since none of the unconscionability statutes even attempt to define unconscionability, courts will have to look elsewhere, for example, to industry standards or societal norms, to determine whether a lease is unconscionable.<sup>37</sup>

### III. The Lease as a Contract

Oliver Wendell Holmes once stated that "the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke."<sup>38</sup> The law of leaseholds, however, has changed significantly in recent years. One of the most important changes is the developing treatment of a lease as a contract rather than a conveyance. This fundamental change paved the way for courts and

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34. RESTATEMENT (SECOND) OF PROPERTY § 5.6, Comment e (1977). The *Restatement* lists the following factors to be considered in determining whether an agreement in a lease is unconscionable: (1) whether it is counter to the policy underlying statutory or regulatory provisions, (2) whether it appears in a lease of commercial or residential property, (3) whether it serves a reasonable business purpose and appears to be the result of conscious negotiations, (4) whether it appears to be part of an unduly harsh and unreasonable standard, "boilerplate" lease document, (5) whether either party habitually disregards it in actual operation under the lease or, in the case of the landlord, under similar leases, (6) whether it imposes unconscionable burdens on persons financially ill-equipped to assume them and who may have had significant inequality of bargaining power, and (7) whether the parties were each represented by counsel in the course of negotiating the lease. *Id.* See also RESTATEMENT (SECOND) OF CONTRACTS § 234, comment d (Tent. Draft Nos. 1-7, 1972).

Other definitions of unconscionability include: "if one party has the power of saying to the other 'That which you require shall not be done except upon the conditions which I choose to impose'. . . ." *Morgan v. Palmer*, 107 Eng. Rep. 554, 556 (K.B. 1824); "'an inequality so strong, gross and manifest, that it is impossible to state it to a man of common sense without producing an exclamation of the inequality of it.'" *Stiefler v. McCullough*, 97 Ind. App. 123, 130, 174 N.E. 823, 826 (1931).

35. URLTA § 1.303, Comment (emphasis added).

36. U.C.C. § 2-302, Comment 1. See 1 A. CORBIN, CONTRACTS § 128 (1963).

37. See *Berger*, *supra* note 13, at 812.

38. *Gardiner v. William S. Butler & Co.*, 245 U.S. 603, 605 (1918).



legislatures to apply the contractual principle of unconscionability to leases.

At common law originally, tenants' rights were purely contractual in nature.<sup>39</sup> During the feudal age, however, a tenant had a possessory interest in the leasehold, with the land itself as the principal element of a lease.<sup>40</sup> Thus, leases were thought of less as contracts and more as conveyances.<sup>41</sup> Accordingly, the concept arose that the rent, the consideration for the lease, issued out of the land itself and, so long as the tenant had possession of the land, the consideration would not fail.<sup>42</sup>

So the law remained for hundreds of years. Landlord-tenant law was based on a single notion—the possession-rent relationship.<sup>43</sup> During the past decade, however, this notion has been destroyed. Courts and legislatures realized that equity required the revision of traditional landlord-tenant law.<sup>44</sup> Contract principles gradually were injected into leases by means of court decisions, federal and state statutes, and local ordinances.<sup>45</sup> Mutual dependency of lease covenants,<sup>46</sup> implied warranties,<sup>47</sup> and mitigation of damages<sup>48</sup> are examples of these contractual principles.

Today, a lease of real property is considered a contract.<sup>49</sup> The pre-

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39. 2 F. POLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 106-07 (2d ed. 1923); 1 *AMERICAN LAW OF PROPERTY* § 3.11 (1952).

40. Hicks, *The Contractual Nature of Real Property Leases*, 24 *BAYLOR L. REV.* 443, 450 (1972) [hereinafter cited as Hicks]. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

41. 1 *AMERICAN LAW OF PROPERTY* § 3.11 (1952); 2 W. BLACKSTONE, *COMMENTARIES* \*318; 1 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 74 (3d ed. 1939); Friedman, *The Nature of a Lease in New York*, 33 *CORNELL L. REV.* 165, 166 (1947). See *Becker v. Manufacturers Trust Co.*, 262 A.D. 525, 527, 30 N.Y.S.2d 542, 544 motion for reargument denied, 263 A.D. 810, 32 N.Y.S.2d 126 (1st Dep't 1941).

42. Hicks, *supra* note 40, at 450.

43. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 228 (1969).

44. Gallet, *The Evolution of Landlord-Tenant Law*, N.Y.L.J., Aug. 13, 1976, at 1, col. 1.

45. Hicks, *supra* note 40, at 446 (1972); 1 *AMERICAN LAW OF PROPERTY* § 3.11 (1952). For a discussion indicating that recent innovations in landlord-tenant law have exceeded even contract law, see Donahue, *Change in the American Law of Landlord and Tenant*, 37 *MODERN L. REV.* 242 (1974).

46. *Lefrak v. Lambert*, 89 Misc. 2d 197, 202, 390 N.Y.S.2d 959, 963 (Civ. Ct. N.Y. 1976).

47. See text accompanying notes 111 & 112 *infra*.

48. See text accompanying notes 214-18 *infra*.

49. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970); *Geraci v. Jenrette*, 41 N.Y.2d 660, 665, 363 N.E.2d 559, 563, 394 N.Y.S.2d 853, 856 (1977). See Hicks, *supra* note 40; Note, *Contract Principles and Leases of Realty*, 50 *B.U. L. REV.* 24 (1970).

section 235-c decisions involving unconscionability stated this in their reasoning.<sup>50</sup> The legislature, in passing section 235-c, viewed the lease as a contract.<sup>51</sup> Similarly, the URLTA rejects the conveyance theory of leases and looks to contract law for regulating the landlord-tenant relationship.<sup>52</sup>

Having removed leaseholds from the exclusive realm of real property, courts now recognize that the land itself is not at the heart of a modern leasehold. In addition to physical space, tenants contract for the landlords' services as well.<sup>53</sup> As one court observed:<sup>54</sup>

[I]n the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Since a lease is no longer perceived as a conveyance, it follows that a landlord is no longer a grantor. Several courts have held him to be a merchant.<sup>55</sup> As they looked to the U.C.C. for a theory of unconscionability,<sup>56</sup> so too did the courts look to the Code for a definition of "merchant."<sup>57</sup> The U.C.C. defines "merchant" as a

50. See 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 355, 335 N.Y.S.2d 872, 873-74 (App. T. 1st Dep't 1972); Avenue Assocs. v. Buxbaum, 83 Misc. 2d 134, 139, 371 N.Y.S.2d 736, 742 (Civ. Ct. N.Y.), *rev'd per curiam*, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (App. T. 1st Dep't 1975); Kips Bay Towers, Inc. v. Armstrong, 82 Misc. 2d 489, 492, 368 N.Y.S.2d 417, 420 (Civ. Ct. N.Y.), *aff'd per curiam*, 85 Misc. 2d 342, 378 N.Y.S.2d 652 (App. T. 1st Dep't 1975).

51. Lefrak v. Lambert, 89 Misc. 2d 197, 202, 390 N.Y.S.2d 959, 963 (Civ. Ct. N.Y. 1976).

52. *Proposed URLTA*, *supra* note 6, at 105.

53. 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 355, 335 N.Y.S.2d 872, 874 (App. T. 1st Dep't 1972); Douglas Manor House, Inc. v. Wohlfeld, 66 Misc. 2d 265, 267, 322 N.Y.S.2d 135, 137 (App. T. 1st Dep't 1970) (dissenting opinion).

54. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

55. See *id.* at 1079; Yengel v. Martinez, N.Y.L.J., Apr. 9, 1975, at 21, col. 3 (Civ. Ct. N.Y.); Seabrook v. Commuter Hous. Co., 72 Misc. 2d 6, 8, 338 N.Y.S.2d 67, 69 (Civ. Ct. N.Y. 1972). See Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 254 (1969).

56. See text accompanying note 12 *supra*.

57. Yengel v. Martinez, N.Y.L.J., Apr. 9, 1975, at 21, col. 3 (Civ. Ct. N.Y.); Seabrook v. Commuter Hous. Co., 72 Misc. 2d 6, 8, 338 N.Y.S.2d 67, 69 (Civ. Ct. N.Y. 1972). *But see* Weidman v. Tomaselli, 81 Misc. 2d 328, 333, 365 N.Y.S.2d 681, 688 (Rockland County Ct. 1975).

person with the knowledge or skill peculiar to the practices or goods involved in the transaction.<sup>58</sup>

Merchants are held to a set of rules which are stricter than the rules applied to nonmerchants. Given this higher standard, a person who contracts with a merchant will find himself "in a more favorable position with the court and protected to a greater extent than if he had contracted with a nonmerchant."<sup>59</sup> Having recognized landlords as merchants, courts should apply this higher standard when a merchant-landlord deals with a nonmerchant-tenant.

#### IV. The Lease as an Adhesion Contract

Modern leases for residential units are often adhesion contracts.<sup>60</sup> Contracts of adhesion are agreements in which one party merely adheres to a document drafted by another, more powerful, party.<sup>61</sup> The process of entering into a contract of adhesion "is not one of haggle or cooperative process but rather of fly and flypaper."<sup>62</sup>

Because most residential landlords use a standard form lease,<sup>63</sup> the tenant has no choice but to sign it. Professor Friedrich Kessler described why such standard forms are adhesion contracts.<sup>64</sup>

58. U.C.C. § 2-104(1).

59. *Seabrook v. Commuter Hous. Co.*, 72 Misc. 2d 6, 8, 338 N.Y.S.2d 67, 69 (Civ. Ct. N.Y. 1972).

60. Cramer, *Extension of the UCC's Unconscionability Contract Provision to Exculpatory Lease Clauses*, 5 AMER. BUS. L.J. 287, 290 (1967); RESTATEMENT (SECOND) OF PROPERTY § 5.6, Reporter's Note 2 (1977); Note, *High-Rise Apartment Leases as Adhesion Contracts*, 22 CLEV. ST. L. REV. 560 (1973); Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. PA. L. REV. 1197 (1963).

61. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 (1953). The term 'contract of adhesion' was introduced into American legal nomenclature by Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

For other definitions and discussions of adhesion contracts, see *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 135 n.11 (4th Cir. 1967); *Standard Oil Co. of Calif. v. Perkins*, 347 F.2d 379, 383 n.5 (9th Cir. 1965); *Redding v. Gulf Oil Corp.*, 67 Misc. 2d 464, 466 n.1, 324 N.Y.S.2d 490, 492 n.1 (Sup. Ct. 1971), *aff'd*, 38 A.D.2d 850, 330 N.Y.S.2d 158 (2d Dep't 1972); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 389-90, 161 A.2d 69, 86 (1960); *Bekken v. Equitable Life Assurance Soc'y*, 70 N.D. 122, 143, 293 N.W. 200, 212 (1940).

62. Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 143 (1970).

63. See *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 1000, 343 N.Y.S.2d 406, 411 (Civ. Ct. N.Y. 1973); Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 836 (1974) [hereinafter cited as Bentley]; Berger, *supra* note 13, at 791; Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. L. REV. 204, 204 (1976) [hereinafter cited as Kirby]; text accompanying notes 234-36 *infra*.

64. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1952).

Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardized contracts are frequently contracts of adhesion. . . .

Courts have recognized that standard form leases are often adhesion contracts.<sup>65</sup> However, the fact that a contract is a printed form and offered on a "take-it-or-leave-it" basis alone does not make it an adhesion contract.<sup>66</sup> Other factors must be present. Although there has been no authoritative analysis of the elements necessary for the existence of an adhesion contract,<sup>67</sup> at least two elements must be present: (1) a necessary, yet scarce, commodity and (2) a bargaining position so unequal that the offeror can dictate the terms of the contract.<sup>68</sup>

### A. The Housing Shortage

In 1976, the vacancy rate for the total rental housing units in the United States was 5.6%. For the northeastern region, the figure was lower, 4.7%. Only 1.9% of the total rental units nationally were vacant year-round in 1976.<sup>69</sup> Courts across the nation have taken judicial notice of the shortage of decent housing in the United

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65. See, e.g., *Santiago v. McElroy*, 319 F. Supp. 284, 294 (E.D. Pa. 1970); *McClelland-Metz Mgt., Inc. v. Faulk*, 86 Misc. 2d 778, 780, 384 N.Y.S.2d 919, 920 (Nassau Dist. Ct. 1976); *Avenue Assocs., Inc. v. Buxbaum*, 83 Misc. 2d 134, 141, 371 N.Y.S.2d 736, 744 (Civ. Ct. N.Y. 1975); *Galligan v. Arovitch*, 421 Pa. 301, 304, 219 A.2d 463, 465 (1966); *Blakely v. Hous. Auth. of the County of King*, 8 Wash. App. 204, 213, 505 P.2d 151, 156 (1973).

66. *Clinic Masters, Inc. v. District Ct.*, 556 P.2d 473, 475 (Col. 1976); *Weidman v. Tomaselli*, 81 Misc. 2d 328, 333, 365 N.Y.S.2d 681, 688 (Rockland County Ct. 1975). A standard form contract results from some advantage of the offeror, not vice-versa. This advantage makes possible the use of a form contract. *Id.*

67. See *Leff, Contract as a Thing*, 19 AM. U. L. REV. 131, 142-43 (1970); *Ehrenzweig, Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1088-89 (1953).

One court has listed four elements which all must be present for a contract to be deemed a contract of adhesion: (1) a necessity of life, (2) a contract for the excessive benefit of the offeror, (3) an economic or other advantage of the offeror, and (4) the offer of the proposed contract on a "take it or leave it basis." *Weidman v. Tomaselli*, 81 Misc. 2d 328, 331, 365 N.Y.S.2d 681, 686 (Rockland County Ct. 1975).

68. See *Weidman v. Tomaselli*, 81 Misc. 2d 328, 331, 365 N.Y.S.2d 681, 686 (Rockland County Ct. 1975); *Avenue Assocs. Inc. v. Buxbaum*, 83 Misc. 2d 134, 141, 371 N.Y.S.2d 736, 744 (Civ. Ct. N.Y. 1976).

69. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 786-87 (1977).

States.<sup>70</sup> The tight rental market has given landlords a big edge in negotiating with tenants.<sup>71</sup>

The New York courts, passing on the unconscionability of leases, clearly have been impressed by the fact that tenants must deal in a depressed housing situation and, hence, a landlord's market.<sup>72</sup> Forced to deal in a landlord's market, tenants are not able to exercise a meaningful choice.<sup>73</sup> The result, as a court stated in 1762, is that "necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."<sup>74</sup>

### B. The Landlord's Superior Bargaining Position

Already faced with a lack of adequate housing, tenants must deal with landlords whose bargaining power is far superior to theirs. Although fifty years ago the New York Court of Appeals stated that landlords and tenants "stand upon equal terms [since] either may equally well accept or refuse entry into the relationship of landlord and tenant,"<sup>75</sup> it is now recognized that there is a gross inequality of bargaining power between a lessor and lessee.<sup>76</sup> Courts consider this inequality when passing on the validity of leases.<sup>77</sup> As Justice

70. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970); *Henriouille v. Marin Ventures, Inc.*, 20 Cal. 3d 512, 519, 573 P.2d 465, 469, 143 Cal. Repr. 247, 251 (1978); *Mease v. Fox*, 200 N.W.2d 791, 794-95 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 331, 521 P.2d 304, 307-09 (1974); *King v. Moorehead*, 495 S.W.2d 65, 71 (Mo. App. 1973); *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 251 (1971); *Marini v. Ireland*, 56 N.J. 130, 141, 145, 265 A.2d 526, 532-33, 535 (1970).

71. See N.Y. Times, Nov. 26, 1978, § 8, at 1, col. 1.

72. See, e.g., cases cited in note 68 *supra*; *State v. Bel Fior Hotel*, 95 Misc. 2d 901, 905, 408 N.Y.S.2d 696, 699 (Sup. Ct. 1978); *Edgemont Assocs. v. Skolnick*, 90 Misc. 2d 761, 762, 396 N.Y.S.2d 130, 131-32, (Town of Greenburgh Justice Ct. 1977); *Lefrak v. Lambert*, 89 Misc. 2d 197, 205; 390 N.Y.S.2d 959, 965 (Civ. Ct. N.Y. 1976); *Harwood v. Lincoln Sq. Apts. Sec. 5, Inc.*, 78 Misc. 2d 1097, 1099, 359 N.Y.S.2d 387, 390 (Civ. Ct. N.Y. 1974); *Steinberg v. Carreras*, 74 Misc. 2d 32, 35, 344 N.Y.S.2d 136, 142 (Civ. Ct. N.Y. 1973).

73. *State v. Bel Fior Hotel*, 95 Misc. 2d 901, 905, 408 N.Y.S.2d 696, 699 (Sup. Ct. 1978).

74. *Vernon v. Bethell*, 28 Eng. Rep. 838, 839 (Ch. 1762).

75. *Kirshenbaum v. General Outdoor Advertising Co.*, 258 N.Y. 489, 495, 180 N.E. 245, 247 (1932).

76. See 2 R. POWELL, *THE LAW OF REAL PROPERTY* § 221(1) (1977).

77. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970); *Kuzmiak v. Brookchester, Inc.*, 33 N.J. Super. 575, 588, 111 A.2d 425, 431 (1955); 57 E. 54 *Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 355, 335 N.Y.S.2d 872, 874 (App. T. 1st Dep't 1972); *Harwood v. Lincoln Sq. Apts. Sec. 5, Inc.*, 78 Misc. 2d 1097, 1099, 359 N.Y.S.2d 387, 390 (Civ. Ct. N.Y. 1974). See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

Frankfurter once stated: "Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?"<sup>78</sup>

There are several factors, besides scarcity, which put the tenant in an inferior bargaining position. Residential tenants rarely are represented by an attorney during the lease negotiations,<sup>79</sup> while landlords usually enjoy the benefit of counsel. Leases are complicated documents, highly favorable to the landlord, which tenants generally do not understand.<sup>80</sup> Landlords are an organized group, in contrast to tenants who rarely organize to exercise group power, particularly *before* they sign their leases.<sup>81</sup> When "negotiating" a lease, a tenant is often under the pressure of time since his existing lease is about to expire.<sup>82</sup> After the lease is signed and a conflict arises between a tenant and his landlord, the former very likely will be unable to afford the costs of litigation.<sup>83</sup>

### C. Conclusion

Although the Official Comment to the U.C.C. suggests that the mere exercise of superior bargaining power does not indicate unconscionability,<sup>84</sup> such inequality in bargaining positions combined with the depressed housing situation suggests the presence of a con-

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78. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942)(dissenting opinion). See *Post v. Jones*, 60 U.S. (19 Howard) 150, 160 (1856); *Parmelee v. Cameron*, 41 N.Y. 392, 395 (1869).

79. *Steinberg v. Carreras*, 74 Misc. 2d 32, 35, 344 N.Y.S.2d 136, 142 (Civ. Ct. N.Y. 1973); Kirby, *supra* note 63, at 232-33.

80. *Avenue Assocs., Inc. v. Buxbaum*, 83 Misc. 2d 134, 141, 371 N.Y.S.2d 736, 744 (Civ. Ct. N.Y. 1975); *Steinberg v. Carreras*, 74 Misc. 2d 32, 35, 344 N.Y.S.2d 136, 142 (Civ. Ct. N.Y. 1973); *Seabrook v. Commuter Hous. Co.*, 72 Misc. 2d 6, 7, 338 N.Y.S.2d 67, 71 (Civ. Ct. N.Y. 1972). See Mueller, *Residential Tenants and their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970).

81. *Steinberg v. Carreras*, 74 Misc. 2d 32, 35, 344 N.Y.S.2d 136, 142 (Civ. Ct. N.Y. 1973).

82. *Seabrook v. Commuter Hous. Co.*, 72 Misc. 2d 6, 7, 338 N.Y.S.2d 67, 69 (Civ. Ct. N.Y. 1972).

83. Kirby, *supra* note 63, at 233.

84. U.C.C. § 2-302, Comment 1; *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F. Supp. 221, 232 (S.D.N.Y. 1975); J. CALAMARI & J. PERILLO, *CONTRACTS* § 9-40 (2d ed. 1977). It has been suggested, however, that a disparity in bargaining power is in *sine qua non* to a finding of unconscionability. Comment, *Bargaining Power and Unconscionability: A Suggested Approach to UCC Section 2-302*, 114 U. PA. L. REV. 998, 999 (1966).

tract of adhesion. Clauses in an "adhesion lease" should be suspect as unconscionable.<sup>85</sup>

## V. The Unconscionable Lease Provisions

To date, courts have found the following lease clauses unconscionable under certain circumstances: (1) attorney's fees provisions, (2) clauses exculpating landlord from liability for delay in delivery of possession, and (3) clauses exculpating landlord from liability for interruptions in services. In addition, certain rents and rent increases have been struck down as unconscionable. There have also been some types of clauses which, though not unconscionable *per se*, were found to be unconscionable in the manner in which they were enforced.

### A. Attorney's Fees

Lease provisions requiring a tenant to reimburse his landlord for attorney's fees and other expenses incurred by the landlord in instituting proceedings resulting from the tenant's default under the lease have been held valid and not contrary to public policy, provided they are reasonable and not in the nature of a penalty.<sup>86</sup> By statute in New York, implied in any lease which contains such a provision is a reciprocal covenant by the landlord to pay to the tenant reasonable attorney's fees and expenses incurred by the tenant as a result of the landlord's failure to perform any agreement under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising from the lease.<sup>87</sup> Any waiver of this statutory right is void as against public policy.<sup>88</sup> Thus, while the legislature has given a *quid pro quo* to a tenant who signs a lease containing an attorney's fees provision, such a provision itself has not been considered unconscionable. The URLTA, however, prohibits any lease provision whereby the tenant agrees to pay the landlord's attorney's fees.<sup>89</sup>

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85. Adhesion clauses are prohibited by the URLTA. URLTA § 1.403, Comment. They are also barred from inclusion in low-rent public housing leases. United States Department of Housing and Urban Development, Circular RHM 7465.6 (Aug. 10, 1970).

86. 379 Madison Avenue, Inc. v. Stuyvesant Co., 242 A.D. 567, 569, 275 N.Y.S. 953, 956 (1st Dep't 1934), *aff'd without opinion*, 268 N.Y. 576, 198 N.E. 412 (1935).

87. N.Y. REAL PROP. LAW § 234 (McKinney 1968).

88. *Id.*

89. URLTA § 1.403(A)(3).

On the other hand, a lease provision<sup>90</sup> which requires the tenant to pay the landlord a specified amount for legal expenses at the commencement of the landlord's action against the tenant has been held unconscionable.<sup>91</sup> Such fees are in the nature of a penalty.<sup>92</sup> If the lease had provided for reasonable legal fees to be awarded to the successful party, such a provision would be valid.<sup>93</sup>

Even where a valid attorney's fee provision was involved, some courts have refused, as a matter of public policy, to enforce the provision against an indigent tenant represented by the Legal Aid Society.<sup>94</sup> At least one court, however, has disagreed sharply with these holdings.<sup>95</sup>

An attorney's fee provisions, although otherwise valid, may be

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90. See, e.g., The Real Estate Board of New York, Inc., Standard Form of Apartment Lease, cl. 22 (1978) [hereinafter cited as Form Lease].

91. McClelland-Metz Mgt., Inc. v. Fault, 86 Misc. 2d 778, 781, 384 N.Y.S.2d 919, 921 (Nassau Dist. Ct. 1976); Weidman v. Tomaselli, 81 Misc. 2d 328, 335, 365 N.Y.S.2d 681, 690 (Rockland County Ct. 1975). The landlord's assertion that section 234 of the New York Real Property Law would allow the tenant to seek equal compensation was held to be without merit by the court:

The statutory right of the respondents [tenants], like the supposed contractual right of the petitioner [landlord], begs the question of whether the attorney's fees demanded are unconscionable. If attorney's fees payable by the respondent are unconscionable [for any reason], then the reason or reasons make attorney's fees payable by the petitioner unconscionable. The Legislature in its wisdom could not have intended that the court countenance unconscionability by either party. . . . The statute does not contemplate that a landlord and a tenant are to be put on equal footing in that each is allowed to exact unconscionable attorney's fees one from the other.

*Id.* at 335-36, 365 N.Y.S.2d at 690.

92. Weidman v. Tomaselli, 81 Misc. 2d 328, 336, 365 N.Y.S.2d 680, 691 (Rockland County Ct. 1975); McClelland-Metz Mgt., Inc. v. Faulk, 86 Misc. 2d 778, 781, 384 N.Y.S.2d 919, 921 (Nassau Dist. Ct. 1976).

93. McClelland-Metz Mgt., Inc. v. Faulk, 86 Misc. 2d 778, 781, 384 N.Y.S.2d 919, 921 (Nassau Dist. Ct. 1976); Weidman v. Tomaselli, 81 Misc. 2d 328, 336-37, 365 N.Y.S.2d 681, 691 (Rockland County Ct. 1975) (dictum).

94. Republic Co. v. Medina, 75 Misc. 2d 279, 279, 347 N.Y.S.2d 785, 785 (Nassau Dist. Ct. 1973); Edot Realty Co. v. Levinson, 54 Misc. 2d 673, 674, 283 N.Y.S.2d 232, 233 (Civ. Ct. N.Y. 1967).

95. Fairhaven Apts. v. James, 79 Misc. 2d 569, 571, 360 N.Y.S.2d 389, 391 (Nassau Dist. Ct. 1974). The court felt it

not proper under the guise of public policy to ignore already existing legal agreements. The mere fact that a tenant receives welfare is not sufficient to negate, cancel out or cause to be null and void a written provision in a lease requiring the tenant to pay attorney's fees because of the tenant's default and this notwithstanding the fact that the tenant is indigent and must look to the county for the meeting of the tenant's obligations.

*Id.*



held unconscionable if it is a part of a standard form lease.<sup>96</sup> At least one court has agreed with the theory behind such an argument. A stipulation of settlement signed by a landlord and tenant which provided for the payment of the landlord's legal fees by the tenant was held to be "a contract of adhesion as a matter of law and an unconscionable bargain which equity will not enforce."<sup>97</sup> However, in a commercial leasing situation, where the bargaining positions of the parties are more equal, an attorney's fee agreement was held not to be an adhesion contract.<sup>98</sup>

### B. Delay in Delivery of Possession

New York tenants have a statutory right to actual possession of the leasehold at the beginning of their terms.<sup>99</sup> The statute abrogates the New York common law rule that the landlord impliedly covenants only that the tenants shall have the legal right to possession at the beginning of the term and not that the landlord covenants to put the tenant in possession as against an intruder.<sup>100</sup>

Nevertheless, the statute gives the landlord a loophole—the implied condition to deliver possession at the beginning of the term can be waived by an express provision to the contrary.<sup>101</sup> Most form leases contain such express provisions.<sup>102</sup> The courts, however, are questioning the conscionability of these exculpation clauses.

In a case involving a family in urgent need of an apartment in

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96. Kirby, *supra* note 63, at 222-23.

97. Bernard v. Kuba, 90 Misc. 2d 148, 153, 394 N.Y.S.2d 782, 786 (Rockland County Ct. 1977).

98. Mury v. Tublitz, 151 N.J. Super. 39, 376 A.2d 547 (1977) (per curiam). The court reversed a lower court's ruling that a lease containing an attorney's fee provision with a minimum amount determined by a percentage of the amount owed the landlord by the tenant was a contract of adhesion because there was no record that the parties were in unequal bargaining positions when the lease was executed. *Id.* at 44, 376 A.2d at 549. *See also* Equitable Lumber Corp. v. IPA Land Dev. Corp., 38 N.Y.2d 516, 523, 344 N.E.2d 391, 396, 381 N.Y.S.2d 459, 464 (1976) (attorney's fee provision in contract was not unconscionable under U.C.C. § 2-302 since contract was not one of adhesion).

99. N.Y. REAL PROP. LAW § 223-a (McKinney 1968).

100. Gardiner v. Keteltas, 3 Hill 330, 331-33 (N.Y. Sup. Ct. 1842). By changing the common law rule, the New York legislature, in effect, was adopting the English rule, which imposes a duty upon the landlord to deliver *actual* possession at the beginning of the term, thereby shifting to the landlord the risk of wrongdoing by a third person. *See* Coe v. Clay, 130 Eng. Rep. 1131, 1131 (C.P. 1829); STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION 452 (1962).

101. N.Y. REAL PROP. LAW § 223-a (McKinney 1968).

102. *See, e.g.,* Form Lease, *supra* note 90, cl. 3.

New York City, the landlord was unable to deliver possession for three months after the beginning of the term because of a hold-over tenant.<sup>103</sup> Although the lease contained a provision which stated the clause to be "an express provision to the contrary" within the meaning of Section 223-a of the New York Real Property Law," the court held that section 235-c should apply and declared the lease provision unconscionable "under the circumstances."<sup>104</sup>

Before section 235-c was enacted, a court held similar exculpatory clauses unconscionable in *Seabrook v. Commuter Housing Co., Inc.*<sup>105</sup> At issue was a four-month wait in delivery due to a delay in construction of the apartment building. The court noted that the exculpatory clauses neither set forth a reasonable period for extension of the time of commencement of the lease nor gave the tenant the option of cancelling the lease agreement if the premises were not ready for occupancy within a reasonable time after the lease was to commence. The court held that the landlord had a duty to set forth a reasonable time limit and to explain the exculpation clauses to the tenant.<sup>106</sup> Although previous decisions had held that a reasonable time for delivery of possession will be implied in such exculpatory clauses,<sup>107</sup> the *Seabrook* court held that the landlord should set forth *affirmatively* a reasonable time limit.<sup>108</sup>

Possibly in an effort to comply with *Seabrook*, the standard form lease used by many residential landlords in New York has been changed. It now provides the tenant an opportunity, after a "reasonable period" has elapsed, to give the landlord written notice of termination. The notice must state that, in the tenant's opinion, a second "reasonable period" will have elapsed at a date not less

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103. *Guterman v. 985 Fifth Ave., Inc.*, N.Y.L.J., Sept. 9, 1977, at 7, col. 2 (Civ. Ct. N.Y.). The landlord failed to inform the new tenant that the holdover tenant had been reneging on promises to vacate for over a year. *Id.*

104. *Id.* at 12, col. 1.

105. 72 Misc. 2d 6, 11, 338 N.Y.S.2d 67, 73 (Civ. Ct. N.Y. 1972), *aff'd*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. T. 2d Dep't 1973).

106. 72 Misc. 2d at 11, 338 N.Y.S.2d at 72-73.

107. *Hartwig v. 6465 Realty Co.*, 67 Misc. 2d 450, 451, 324 N.Y.S.2d 567, 568 (App. T. 1st Dep't 1971)(per curiam) (eight-month delay in delivery of possession, after one-fifth of term had expired, was held unreasonable).

108. 72 Misc. 2d at 11, 338 N.Y.S.2d at 72-73. The appellate term, affirming, said it was unnecessary to consider whether the doctrine of unconscionability should be applied since the landlord failed to satisfy its implied promise to deliver possession on the date fixed by the lease or within a reasonable time. 79 Misc. 2d 168, 168, 363 N.Y.S.2d 566, 567 (2d Dep't 1973)(per curiam).

than thirty days from the date of the notice, at which date the lease shall terminate. However, the burden of deciding what a reasonable time is still remains on the tenant. To further complicate the tenant's position, the standard exculpatory clause, while allowing for the rent payments to be suspended during the period of delay, specifically states that the landlord's failure to give possession shall not extend the term of the lease.<sup>110</sup> It is not hard to envision a tenant, unsure when a "reasonable period" has elapsed, being held to his lease by a landlord when less than one-half of his leasehold term remains and when the tenant has signed a lease for other premises. If the landlord brings the tenant into court for non-payment of rent, the court can declare such a lease provision unconscionable.

### C. Interruption of Services

Since 1975, first by court decision<sup>111</sup> and then by statute,<sup>112</sup> New York tenants have been protected by an implied warranty of habitability. The modern tenant, however, contracts not only for the premises but for a package of services to be supplied by the landlord.<sup>113</sup> Although the statute bars any waiver of the implied warranty,<sup>114</sup> landlords have attempted to exculpate themselves from any liability caused by interruptions in essential services.<sup>115</sup>

In *Groner v. Lakeview Management Corp.*,<sup>116</sup> the courts considered such an exculpatory clause.<sup>117</sup> In addition to other complaints, the tenant claimed that her apartment, over a period of three years, was without heat and hot water for six days during the winter

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109. Form Lease, *supra* note 90, cl. 3.

110. *Id.*

111. *Tonetti v. Penati*, 48 A.D.2d 25, 29, 367 N.Y.S.2d 804, 808 (2d Dep't 1975).

112. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1978).

113. See notes 53 & 54 *supra* & accompanying text.

114. N.Y. REAL PROP. LAW § 235-b(2) (McKinney Supp. 1978).

115. One of the most recent standard form leases contains a provisions stating:

As long as Tenant obeys all of the provisions of the Lease, Landlord will give to Tenant, only insofar as the existing building equipment and facilities provide, the following services:

(1) elevator service; (2) hot and cold water in reasonable amounts at all times; (3) heat as required by law. . . .

Stoppage or reduction of any of the above services shall not entitle Tenant to any allowance or reduction of rent unless as provided by law.

Form Lease, *supra* note 90, cl. 10.

116. 83 Misc. 2d 932, 373 N.Y.S.2d 807 (Civ. Ct. N.Y. 1975).

117. The lease provision in question was almost identical to the provision set forth in note 115 *supra*. *Id.* at 934, 373 N.Y.S.2d at 809.

months and elevator service for forty-five days. After deciding that the tenant could sue affirmatively for damages on a claim of breach of the warranty of habitability,<sup>118</sup> the court considered the exculpatory lease clause and held it to be "a classic example of unconscionability."<sup>119</sup> The court refused to enforce the clause and awarded damages to the tenant.<sup>120</sup>

The unconscionability of these clauses does not depend on the warranty of habitability. Even before New York adopted the doctrine of the implied warranty, a clause exculpating a landlord from any liability for an interruption or curtailment in services was held unconscionable.<sup>121</sup> At issue was a complete stoppage of an apartment building's central air conditioning system for six weeks during the summer. The court interpreted the lease clause to mean that the tenant agreed to release the landlord from liability only for slight interruptions of services but not for major ones.<sup>122</sup>

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118. *Id.* at 935, 373 N.Y.S.2d at 810. Previously, the doctrine of implied warranty of habitability had been applied mainly as a defense or setoff in nonpayment summary proceedings. *Id.* at 932, 373 N.Y.S.2d at 809-10.

119. *Id.* at 934, 373 N.Y.S.2d at 809.

120. *Id.* at 935, 373 N.Y.S.2d at 810. However, since there was inadequate proof of damages, the tenant was limited to nominal damages. *Id.* See *Steinberg v. Carreras*, 77 Misc. 2d 774, 775, 357 N.Y.S.2d 369, 370 (App. T. 1st Dep't 1974) (per curiam) (reversing lower court's award of set-off to tenant due to lack of heat because there was no adequate proof or reduced value of premises as a result of lack of heat).

In 1976, the warranty of habitability statute was amended to provide that expert testimony not be required for a court to determine the amount of damages sustained by a tenant as a result of a breach of the warranty. N.Y. REAL PROP. LAW § 235-b(3) (McKinney Supp. 1978). See *Park West Mgt. Corp. v. Mitchell*, 62 A.D.2d 291, 404 N.Y.S.2d 115 (1st Dep't 1978) (affirming 10% rent abatement due to interruption in garbage removal and janitorial services); *Kekillas v. Saddy*, 88 Misc. 2d 1042, 389 N.Y.S.2d 756 (Nassau Dist. Ct. 1976) (awarding only nominal damages because tenant failed to prove any actual damages caused by presence of odor of cat urine).

121. *Harwood v. Lincoln Sq. Apts. Sec. 5, Inc.*, 78 Misc. 2d 1097, 1100, 359 N.Y.S.2d 387, 391 (Civ. Ct. N.Y. 1974).

122. *Id.* at 1098, 359 N.Y.S.2d at 390. Just five months before this decision, the same court considered a similar case but refused to hold the landlord liable for damages. *Hausman v. Residential Funding Corp.*, 76 Misc. 2d 522, 351 N.Y.S.2d 265 (Civ. Ct. N.Y. 1973). The case involved an exculpatory clause identical to the one in *Harwood* and a suspension of air conditioning for 39 summer days. Though the court expressed its displeasure with the exculpatory clause, it refused to find that the landlord had either a contractual or statutory duty to repair the air conditioning system despite the landlord's covenant in the lease to provide such a service. The court noted, but seemingly did not base its decision on, the fact that the landlord had incurred \$22,000 in expenses in an attempt to repair the system. *Id.* at 523-24, 351 N.Y.S.2d at 267-68. *Harwood*, to the contrary, held that the tenant could recover for the landlord's breach of his covenant to supply air conditioning. 78 Misc. 2d at 1110, 359 N.Y.S.2d at 391. For a discussion of *Harwood* and *Hausman*, see Kirby, *supra* note 63, at 228-29.

Leasehold unconscionability will prove to be a strong tool for courts to use against landlords seeking to shield themselves from liability, even where a statutory authorization of the landlords' actions exists. Courts will not allow landlords to escape liability for excessive interruptions in services.

#### D. The Unconscionable Rent

Unfair price agreements have never been looked upon favorably by the courts.<sup>123</sup> The U.C.C. unconscionability provision is used to strike down contract sale prices which the courts deem unconscionable.<sup>124</sup> The first reported case employing the U.C.C. provision has been cited for the general proposition that extreme inadequacy of consideration may constitute unconscionability.<sup>125</sup>

Courts also use the doctrine of unconscionability to prohibit unduly high rents. In one of the first leasehold unconscionability decisions, a court held that the renewal rent set by a landlord for a commercial tenant was unconscionable.<sup>126</sup> The lease allowed the tenant to renew for an additional term at a rent to be determined by the landlord.<sup>127</sup> The landlord increased the rent for the new term by \$1600 a month—from \$400 to \$2000 per month. The court stated that "[t]he law in such cases (*i.e.*, lease renewals) properly imposes a condition that the rentals so fixed be not arbitrary and unconscionable."<sup>128</sup> The court affirmed<sup>129</sup> a lower court ruling that a new trial be ordered to determine a rent "not unconscionable in the

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123. See *Hume v. United States*, 132 U.S. 406 (1889); *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948); *Greer v. Tweed*, 13 Abb. Pr. (n.s.) 427 (C.P. 1872); *James v. Morgan*, 83 Eng. Rep. 323 (K.B. 1793).

124. *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 191-92, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969); *State v. ITM, Inc.*, 52 Misc. 2d 39, 53, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 27, 274 N.Y.S.2d 757, 759 (Nassau Dist. Ct. 1966), *rev'd per curiam*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 2d Dep't 1967).

125. *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964). The case involved a charge of \$2,568.60 for goods and services valued at \$959. The customer was charged with an \$800 commission plus interest and carrying charges totalling \$809.60. *Id.* at 439, 201 A.2d at 888. See Note, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 WM. & MARY L. REV. 1143, 1155 (1968); Comment, *Unconscionability—The Code, the Court and the Consumer*, 9 B.C. IND. & COMM. L. REV. 367, 371 (1968).

126. *Tai on Luck Corp. v. Cirola*, 35 A.D.2d 380, 381, 316 N.Y.S.2d 438, 439 (1st Dep't 1970), *appeal dismissed*, 29 N.Y.2d 747, *motion for reconsideration of dismissal denied*, 29 N.Y.2d 868 (1971).

127. 35 A.D.2d at 381, 316 N.Y.S.2d at 439.

128. *Id.* at 382, 316 N.Y.S.2d at 440.

129. *Id.*

circumstances, upon proof of all relevant factors and not necessarily confined to what may be deemed a reasonable rent."<sup>130</sup> On remand, the trial court fixed the rental at \$525 a month.<sup>131</sup>

Since section 235-c was enacted, a court refused to pass on a rent increase against mobile home tenants because the tenants rented under a month-to-month tenancy, which is not a leasehold tenancy, and thus, not covered by the statute.<sup>132</sup> The court, moreover, found an alternative ground to hold against the tenants. Assuming there had been a lease to satisfy section 235-c, the court reasoned a request for a rent increase would not be covered by the statute since the rent increase request was not part of the lease when the lease was made.<sup>133</sup> It appears, then, that the unconscionability statute cannot be applied to rent *increases* since it requires a showing of unconscionability when the lease was made.<sup>134</sup> Nevertheless, there is no reason why a court could not invoke its equitable powers to hold a rent increase unconscionable.<sup>135</sup>

Although courts require a showing of unequal bargaining power to hold a lease or contract unconscionable,<sup>136</sup> many of the decisions concerning unconscionable rents or prices concern a particular type of unequal bargaining—that involving non-English speaking tenants<sup>137</sup> or customers<sup>138</sup> who are often on public assistance. Although the leasehold unconscionability decisions have considered the land-

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130. N.Y.L.J., May 25, 1970, at 2, col. 2 (App. T. 1st Dep't).

131. 69 Misc. 2d 925, 928, 331 N.Y.S.2d 250, 253 (Civ. Ct. N.Y. 1972). The court considered the following factors in determining a rent figure: the location of the store, the condition of the economy, the dollar purchasing value, real estate taxes, and the long tenure (fifty-five years) of the tenant. *Id.*

132. Valley Forge Village v. Anthony, 92 Misc. 2d 1007, 1009-10, 401 N.Y.S.2d 978, 980 (Suffolk Dist. Ct.) *aff'd per curiam*, 96 Misc. 2d 62, 409 N.Y.S.2d 957 (App. T. 2d Dep't 1978). See text accompanying notes 250-57 *infra*.

133. 92 Misc. 2d 1010, 401 N.Y.S.2d at 980.

134. N.Y. REAL PROP. LAW § 235-c(1) (McKinney Supp. 1978).

135. See Tai on Luck Corp. v. Cirota, 35 A.D.2d 380, 316 N.Y.S.2d 438 (1st Dep't 1970); cases cited in note 123 *supra*.

136. See notes 29-34 *supra* & accompanying text.

137. Yengel v. Martinez, N.Y.L.J., Apr. 9, 1975, at 21, col. 3 (Civ. Ct. N.Y.).

138. Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau Dist. Ct. 1966). See also Brooklyn Union Gas Co. v. Jimenez, 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. N.Y. 1975)(contract to buy gas conversion burner signed by non-English speaking person held unconscionable); Jefferson Credit Corp. v. Marciano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. N.Y. 1969)(automobile sales contract in which non-English speaking buyer waived warranties of merchantability and fitness held unconscionable).

lord's superior bargaining powers,<sup>139</sup> it may be necessary to show a language barrier or economic weakness in order to have a rental price held unconscionable.<sup>140</sup>

This is particularly true in cases involving "two leases," a ploy commonly used by landlords against tenants on public assistance. The landlord requires a tenant who is a welfare recipient to agree to a rental above the maximum provided by the Department of Social Services. The parties then enter into a side agreement, usually oral, for a rental greater than that stated in the lease. The tenant usually makes up the difference out of his food allowance.<sup>141</sup> These ploys generally have been held unenforceable.<sup>142</sup> Noting that a tenant on welfare has the particular handicap of having to find an apartment at a rental permitted by the welfare regulations, a court has stated "the unequal bargaining power of the parties combined with the economic plight of the tenant . . . raises a valid equitable defense of economic duress or coercion."<sup>143</sup> Where there was no economic coercion, a court refused to hold the second lease unconscionable.<sup>144</sup>

Now, even tenants whose premises are not rent-controlled will find protection from unreasonable rents. This does not mean, however, that courts will become rent control boards. A landlord not subject to rent control laws still has the freedom to contract a fair rental price. It is the price so unfair that it is unconscionable which a court will refuse to enforce.

### E. Unconscionable Enforcement of Conscionable Lease Provisions

Most leases contain a provision that the landlord's failure to enforce any lease provision does not mean that he has waived his right

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139. See cases cited in note 77 *supra*.

140. See Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 768-71 (1969). But see *Euclid Ave. Assocs. v. City of N.Y.*, 64 A.D.2d 550, 406 N.Y.S.2d 844 (1st Dep't 1978) (mem.).

141. *Tinnin v. Tinnin*, N.Y.L.J., Apr. 16, 1975, at 20, col. 1 (Civ. Ct. N.Y.).

142. *Id.*, *McGarvey v. Johnson*, N.Y.L.J., May 14, 1975, at 21, col. 1 (Civ. Ct. N.Y.); *Yengel v. Martinez*, N.Y.L.J., Apr. 9, 1975, at 21, col. 3 (Civ. Ct. N.Y.). However, the courts are split on whether, once they have held the second lease unconscionable, the tenant is entitled to a set-off for the over-payments made in the past. *Tinnin* and *Yengel* allowed a set-off; *McGarvey* did not.

143. *McGarvey v. Johnson*, N.Y.L.J., May 14, 1975, at 21, col. 2 (Civ. Ct. N.Y.).

144. *Nethersole v. Brown*, N.Y.L.J., Feb. 22, 1978, at 10, col. 1 (Civ. Ct. N.Y.). This case did not involve two leases for one apartment but two leases for two apartments. The tenant got the Department of Social Services' approval to rent one apartment but then signed a lease to rent a larger one. *Id.* at 10, col. 4.

to do so in the future.<sup>145</sup> In addition, leases often state that the manner in which rules and regulations contained in the lease are enforced against one tenant shall have no effect on other tenants.<sup>146</sup> Several court decisions, however, may have made these provisions meaningless. Courts are not allowing landlords to enforce a lease provision merely to harass tenants or to use the provision as an excuse for evicting tenants for other reasons.

The right of a tenant to keep an animal in his apartment is an example of a court's refusal to permit an unconscionable enforcement of a conscionable lease provision. Many leases prohibit the harboring of any animals unless the tenant has received express written permission from the landlord.<sup>147</sup> Other leases contain an absolute prohibition against the harboring of animals. Both types of clauses have been held enforceable many times.<sup>148</sup> In addition, violations of such prohibitions are considered substantial breaches of the lease agreement and, thus, grounds for eviction.<sup>149</sup> The fact that the landlord has collected rent payments with knowledge of the violation or that the landlord has permitted other tenants to violate the prohibition has not been considered a waiver of the prohibition as it applies to any other tenant.<sup>150</sup>

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145. See, e.g., Form Lease, *supra* note 90, cl. 25(A).

146. See, e.g., *id.*, cl. 9. If the landlord fails to enforce a provision under a lease or a similar lease, such action is a factor to consider when determining if the provision is unconscionable. RESTATEMENT (SECOND) OF PROPERTY § 5.6, Comment e (1977).

147. See, e.g., Form Lease, *supra* note 90, Rule and Regulation 13.

148. For decisions upholding lease provisions allowing animals, only with the landlord's permission, see 930 Fifth Avenue v. King, 40 A.D.2d 140, 142, 338 N.Y.S.2d 773, 775 (1st Dep't 1972)(per curiam), *appeal dismissed*, 31 N.Y. 2d 1046 (1973); Hillman Housing Corp. v. Krupnik, 40 A.D.2d 788, 788, 337 N.Y.S.2d 547, 548 (1st Dep't 1972)(mem.). For decisions upholding lease provisions completely prohibiting animals, see Pollack v. J.A. Green Construction Corp., 40 A.D.2d 996, 997, 338 N.Y.S.2d 486, 487 (2d Dep't 1972)(mem.), *aff'd without opinion*, 32 N.Y.2d 720, 297 N.E.2d 99, 344 N.Y.S.2d 363 (1973); Riverbay Corp. v. Klinghoffer, 34 A.D.2d 630, 630, 309 N.Y.S.2d 472, 473 (1st Dep't 1970).

149. 930 Fifth Avenue v. King, 40 A.D.2d 140, 142, 338 N.Y.S.2d 773, 775 (1st Dep't 1972)(per curiam); Pollack v. J.A. Green Construction Corp., 40 A.D.2d 996, 997, 338 N.Y.S.2d 486, 487 (2d Dep't 1972)(mem.).

150. Pollack v. J.A. Green Construction Corp., 40 A.D.2d 996, 997, 338 N.Y.S.2d 486, 487 (2d Dep't 1972)(mem.); Riverbay Corp. v. Klinghoffer, 34 A.D.2d 630, 630, 309 N.Y.S.2d 472, 474 (1st Dep't 1970)(mem.); 930 Fifth Avenue v. King, 40 A.D.2d 140, 141-42, 338 N.Y.S.2d 773, 775 (1st Dep't 1972)(per curiam); Luna Park Housing Corp. v. Besser, 38 A.D.2d 713, 714, 329 N.Y.S.2d 332, 333 (2d Dep't 1972)(mem.). *But see* New York Life Insur. Co. v. Dick, 71 Misc. 2d 52, 59-60, 335 N.Y.S.2d 802, 808-09 (Civ. Ct. N.Y. 1972).

There is no requirement that a landlord treat each of his tenants in the same manner with respect to every lease provision. A landlord may waive a provision for one tenant but strictly



In *Belmar Realty Corp. v. Brown*,<sup>151</sup> the Civil Court of the City of New York held unconscionable a lease provision which allowed the harboring of animals only with the landlord's permission and which stated that such permission, if given, is revocable at anytime by the landlord.<sup>152</sup> The court distinguished the case from one involving a lease containing an absolute prohibition against pets.<sup>153</sup> It did not, however, distinguish the case from those where lease provisions allowing pets only with the landlord's permission were held valid.<sup>154</sup> The unconscionability in *Belmar* stemmed from the fact that the landlord could arbitrarily and capriciously withdraw his permission. Thus, although the court held the provision itself unconscionable, in light of the well-settled rule that a landlord can require his consent for the harboring of an animal,<sup>155</sup> the decision must be read to mean that, once the landlord has given his consent, he cannot revoke it without good reason.<sup>156</sup> If the animal proves to be a nuisance, there would be good cause to withdraw consent. Where the landlord is merely looking for an excuse to evict the tenant, such would be an unconscionable enforcement of the lease.

Another example of the unconscionable enforcement of a lease provision is *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*<sup>157</sup>

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enforce it against another. 930 Fifth Avenue Corp. v. King, 64 Misc. 2d 776, 779, 315 N.Y.S.2d 966, 969 (Civ. Ct. N.Y. 1970), *aff'd*, 71 Misc. 2d 359, 336 N.Y.S.2d 22 (App. T. 1st Dep't), *rev'd on other grounds per curiam*, 40 A.D.2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972). However, the New York Court of Appeals has indicated that if the tenant could prove that the landlord exercised unreasonable discrimination among tenants, and thereby breached his implied obligation to exercise good faith in any dealings, there may be a waiver of the prohibition. See *Brigham Park Coop. Apts. Sec. No. 2, Inc. v. Kraus*, 21 N.Y.2d 941, 943, 327 N.E.2d 86, 86, 289 N.Y.S.2d 769, 770 (1968)(mem.), *aff'g* 28 A.D.2d 846, 282 N.Y.S.2d 938 (2d Dep't 1967)(mem.). The dissent in the appellate division thought a triable issue existed concerning the landlord's discriminatory practice. *Id.* at 846, 282 N.Y.S.2d at 938.

151. N.Y.L.J., July 25, 1974, at 11, col. 2 (Civ. Ct. N.Y.).

152. *Id.* Leases generally provide for such revocation of consent. See, e.g., Form Lease, *supra* note 90, Rule and Regulation 13.

153. N.Y.L.J., July 25, 1974, at 11, col. 2 (Civ. Ct. N.Y.).

154. See cases cited in note 148 *supra*. The decisions in these cases do not indicate whether the landlord could revoke his consent.

155. See cases cited in note 148 *supra*.

156. The court noted that the dog involved had not been charged with any nuisance, was carefully controlled by the tenant, was well-liked by other tenants, and was one of several dogs known by the landlord to be kept in the building. The court was not perturbed by the fact that the tenant had never obtained written permission to harbor the dog. N.Y.L.J., July 25, 1974, at 11, col. 2.

157. 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. T. 1st Dep't 1972), *leave to appeal denied*, N.Y.L.J., Oct. 18, 1972, at 2, col. 1 (App. T. 1st Dep't).

The commercial tenant held a fifteen-year lease with nine years to run. Although the record showed that the tenant had been late with his rent payments during the prior five years and that the landlord had always accepted the late payments without invoking the right of termination, the landlord decided to enforce the termination provisions<sup>158</sup> after a late payment.<sup>159</sup> The trial court held for the tenant, on the basis of an estoppel defense.<sup>160</sup> The appellate court, however, went further. After noting that a requirement of good faith between landlords and tenants is now being read into leases, the court stated that the "[l]andlord's effort to bring tenant's lease to an end by subtle device verges on the unconscionable."<sup>161</sup> The court was concerned *not* with an unconscionable lease, but with the landlord's unconscionable behavior, which the court called "surreptitious."<sup>162</sup>

In *SKD Enterprises, Inc. v. L & M Offset Inc.*,<sup>163</sup> a lease provision required the tenant to install any sprinkler system ordered by a governmental unit. The fire department determined that a sprinkler system was necessary for the tenant to legally conduct his off-set printing business. The landlord demanded that the tenant pay one-half the cost of the sprinkler system, which was twice the amount of rent remaining under the lease. Noting that the sprinkler system would be of substantial benefit to the landlord but of minimal benefit to the tenant, the court held unconscionable a construction of the lease provision requiring the tenant to pay for an improvement which was worthless to him.<sup>164</sup>

In another case, a court considered a law firm's lease provision permitting the landlord to discontinue certain services.<sup>165</sup> The landlord claimed that the clause gave him a right to discontinue sub-metering electric current service to the tenant. If the landlord discontinued the sub-metering practice, the tenant would have had to

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158. For an example of such a provision, see Form Lease, *supra* note 90, cl. 19.

159. 71 Misc. 2d at 355, 335 N.Y.S.2d at 874 (concurring opinion).

160. Berger, *supra* note 13, at 807. The trial court opinion is unreported. Professor Berger culled the facts not appearing in the appellate term opinion from the pleadings and briefs. *Id.* at 806 n.64.

161. 71 Misc. 2d 353-54, 335 N.Y.S.2d 872-73 (App. T. 1st Dep't 1972).

162. *Id.* at 355, 335 N.Y.S.2d at 874 (emphasis added). See Berger, *supra* note 13, at 808. Professor Berger questions whether, the more one-sided the lease, the more the landlord must act fairly. *Id.*

163. 65 Misc. 2d 612, 318 N.Y.S.2d 539 (Civ. Ct. N.Y. 1971).

164. *Id.* at 612-15, 318 N.Y.S.2d at 540-43.

165. DiCostanzo v. Court Tower Corp., 410 N.Y.S.2d 212, 213 (Sup. Ct. 1978).

obtain direct electric current service, at a cost of \$10,000. The tenant claimed that the lease did not apply to the electrical equipment present at the time of the execution of the lease. The court rejected both arguments and examined the intentions of the parties when they agreed to the provision. It was inconceivable to the court that the landlord would want or allow each of more than thirty tenants to install his own electrical current service.<sup>167</sup> Nor did the court think it conceivable that the parties agreed the landlord could, "out of sheer spite, vengeance, or retaliatory motive," require the tenant with a short term remaining to incur an installation more costly than the rental owed.<sup>168</sup> No other tenant was given notice of discontinuance of the sub-metering service and the landlord admitted its action was motivated by the tenant's success in a previous nonpayment proceeding.<sup>169</sup> Holding that the construction of the provision as claimed by the landlord was conceived with retaliatory motives and was not contemplated by the parties, the court enjoined the landlord from terminating the electrical current service to the tenant.<sup>170</sup>

Other cases involve an unconscionable result as opposed to an unconscionable means.<sup>171</sup> Though section 235-c empowers the court to "so limit the application of any unconscionable clause as to avoid any unconscionable result,"<sup>172</sup> the statute assumes the court to have already declared the *clause* unconscionable, not just the result. For a clause to be held unconscionable, the court must find it was unconscionable at the time it was made.<sup>173</sup> Courts, therefore, are on

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166. *Id.* at 213-14.

167. *Id.* at 214.

168. *Id.*

169. *Id.* at 213.

170. *Id.* at 215.

171. See *Friedman v. Jordan*, N.Y.L.J., June 9, 1977, at 5, col. 4 (Sup. Ct.) *aff'd without opinion*, 60 A.D.2d 1008, 401 N.Y.S.2d 672 (1st Dep't 1970) (hearing ordered under section 235-c to determine if a tenant, who obtained a stipulation setting her rent at \$132.25 a month, can sub-let apartment for three years at monthly rental of \$350); 64 Univ. Place v. Samstein, N.Y.L.J., June 13, 1978, at 10, col. 1 (Civ. Ct. N.Y.) (although lease provision requiring tenant to pay share of building's electric bill in proportion to amount of space he occupies is not unconscionable, manner in which clause is applied may be unconscionable if some tenants consume more than normal share); *Pine Top Assocs. v. Hirsch and Sons Deli World, Inc.*, 92 Misc. 2d 470, 400 N.Y.S.2d 665 (Town of Greenburgh Justice Ct. 1977)(unconscionable to evict commercial assignee when assignor failed to get landlord's permission to assign lease).

172. N.Y. REAL PROP. LAW § 235-c (McKinney Supp. 1978).

173. *Id.*; 200 East Tenants Corp. v. Sherry, N.Y.L.J., May 10, 1978, at 11, col. 1-2 (Sup.

uncertain ground if they rely on section 235-c to hold the enforcement of a lease clause, but not the clause itself, unconscionable. Courts, however, are not powerless to act in such cases. They can invoke the equitable doctrine of unconscionability<sup>174</sup> to police against unconscionable results such as the use of a lease provision for a retaliatory or capricious motive.<sup>175</sup>

## VI. Unconscionability and Commercial Leases

Most of the cases discussed thus far involved leases of residential property. When a tenant under a commercial lease petitions a court

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Ct.); *Valley Forge Village v. Anthony*, 92 Misc. 2d 1007, 1010, 401 N.Y.S.2d 978, 980 (Suffolk Dist. Ct.), *aff'd per curiam*, 96 Misc. 2d 62, 409 N.Y.S.2d 957 (App. T. 2d Dep't 1978). See text accompanying notes 258-63 *infra*.

174. See notes 22-24 *supra* and accompanying text; *Berger*, *supra* note 13, at 805-06.

175. Several other decisions have held a variety of lease provisions unconscionable. The use of a "savings clause" in a renewal lease of an apartment subject to rent stabilization has been deemed unconscionable since it places an unreasonable burden on tenants to determine the legal effects of their lease provisions. *Kips Bay Towers, Inc. v. Armstrong*, 82 Misc. 2d 489, 368 N.Y.S.2d 417, 372 N.Y.S.2d 437 (Civ. Ct. N.Y.), *aff'd per curiam*, 85 Misc. 2d 342, 378 N.Y.S.2d 652 (App. T. 1st Dep't 1975). A court found unconscionable a lease provision holding all the student-tenants liable for any damage when it could not be determined who was responsible or if the tenant who was responsible was unable to pay for the repair. *State v. Bel Fior Hotel*, 95 Misc. 2d 901, 408 N.Y.S.2d 696 (Sup. Ct. 1978). Applying section 235-c, a court invalidated a lease application stating a real estate broker was entitled to a fee from a prospective tenant when the broker found an apartment for the tenant even if the tenant did not take the apartment. *Sidnam v. Washington Sq. Realty Corp.*, 95 Misc. 2d 825, 408 N.Y.S.2d 988 (App. T. 1st Dep't 1978)(*per curiam*). Another court ordered a hearing to determine if a lease provision waiving the tenant's right to bring a counter-claim in a summary proceeding brought by the landlord was unconscionable. *Edgemont Assocs. v. Skolnick*, 90 Misc. 2d 761, 396 N.Y.S.2d 130 (Town of Greenburgh Justice Ct. 1977). However, such waivers do not offend public policy. *Linker v. Herard*, 13 Misc. 2d 445, 180 N.Y.S.2d 793 (App. T. 2d Dep't 1958)(*per curiam*); *Amazon Mgt. Corp. v. Paff*, 166 Misc. 2d 438, 1 N.Y.S.2d 976 (App. T. 2d Dept. 1938). But a waiver of the right to counter-claim in any type of proceeding brought by the landlord was held unconscionable. *Shore Haven Apts. No. III, Inc. v. De Santis*, N.Y.L.J., Mar. 20, 1979, at 15, col. 3 (Civ. Ct. N.Y.). See *Form Lease*, *supra* note 90, cl. 29.

A trial court held unconscionable a lease provision allowing a landlord, in the event of a rent default, to re-enter the premises peacefully but without legal process. *Pine Hill Assocs. v. Malveaux*, 89 Misc. 2d 234, 391 N.Y.S.2d 58 (Yonkers City Ct. 1977), *rev'd mem.*, 93 Misc. 2d 63, 403 N.Y.S.2d 398 (App. T. 2d Dep't 1978). The appellate term reversed, holding that the landlord had a common law right to re-enter peacefully without court process. The court ordered a new trial to determine whether the landlord first made a demand for the rent, as required before he can exercise his common law right. 93 Misc. 2d 63, 403 N.Y.S.2d 398 (App. T. 2d Dep't 1978).

An Ohio court invalidated as unconscionable a lease provision requiring public housing tenants to report the presence of overnight guests. *Heritage Hills, Ltd. v. Smith*, 78-CVG-268 (Chillicothe, O. Mun. Ct. May 8, 1978) in 12 CLEARINGHOUSE REV. 192 (1978). An Oregon court, however, applying that state's leasehold unconscionability statute, OR. REV. STAT. §

to declare one of the lease clauses unconscionable, he bears a heavier burden than a residential tenant. As previously noted, although the URLTA only applies to leases of residential space,<sup>176</sup> section 235-c applies to both residential and commercial leases.<sup>177</sup>

Courts are not receptive to pleas of unconscionability by one merchant against another.<sup>178</sup> In leases of commercial space, courts consider the parties to be in more equal bargaining positions than in leases of residential space and, thus, capable of dealing at arm's length.<sup>179</sup> A commercial tenant, unlike his residential counter-part, is generally a sophisticated businessman<sup>180</sup> who usually negotiates his lease<sup>181</sup> and enjoys the benefit of counsel.<sup>182</sup> Given these factors, a disparity in bargaining power is rarely present in leases for commercial space.<sup>183</sup> In addition, commercial premises are not as scarce as residential ones.<sup>184</sup>

For example, commercial leases often contain escalation clauses which pass along to tenants, in the form of rent increases, any increases which landlords must pay in taxes or in wages to the building employees. Courts have refused to find such clauses unconscionable.<sup>185</sup>

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91.375 (1977), upheld a \$185 fee paid by the tenants in exchange for the right to terminate the lease on thirty days' notice. *Zemp v. Rowland*, 31 Or. App. 1105, 572 P.2d 637 (1977).

176. See note 8 *supra* and accompanying text.

177. See note 9 *supra* and accompanying text.

178. *Blake v. Biscardi*, 62 A.D.2d 975, 976, 403 N.Y.S.2d 544, 546 (2d Dep't 1978)(mem.).

179. *J.J. Newberry Co. v. Mixon*, 440 F. Supp. 20, 21-22 (E.D. Mo. 1977)(mem.); *Moores-town Mgt., Inc. v. Moorestown Bookshop, Inc.*, 104 N.J. Super. 250, 259, 249 A.2d 623, 628 (1969); *Twenty-One Assocs., Inc. v. Goldberg*, N.Y.L.J., July 6, 1977, at 10, col. 2 (Sup. Ct.); *64 Univ. Place v. Samstein*, N.Y.L.J., June 13, 1978, at 10, col. 2 (Civ. Ct. N.Y.).

180. *Graziano v. Tortora Agency, Inc.*, 78 Misc. 2d 1094, 1096, 359 N.Y.S.2d 489, 491-92 (Civ. Ct. N.Y. 1974); *Rich v. Don-Ron Trousers Corp.*, 74 Misc. 2d 259, 261, 343 N.Y.S.2d 684, 686 (Civ. Ct. N.Y. 1973).

181. *J.J. Newberry Co. v. Mixon*, 440 F. Supp. 20, 22 (E.D. Mo. 1977)(mem.); *George Backer Mgt. Corp. v. Acme Quilting Co.*, 55 A.D.2d 535, 535, 389 N.Y.S.2d 111, 112 (1st Dep't 1976)(mem.).

182. *Graziano v. Tortora Agency, Inc.*, 78 Misc. 2d 1094, 1096, 359 N.Y.S.2d 489, 492 (Civ. Ct. N.Y. 1974); *Rich v. Don-Ron Trousers Corp.*, 74 Misc. 2d 259, 261, 343 N.Y.S.2d 684, 686 (Civ. Ct. N.Y. 1973).

183. See text accompanying notes 75-83 *supra*. However, a small-business tenant may find himself in no better a bargaining position with a landlord than a residential tenant. See *J. CALAMARI & J. PERILLO, CONTRACTS* § 9-39 (2d ed. 1977).

184. *Twenty-One Assocs., Inc. v. Goldberg*, N.Y.L.J., July 6, 1977, at 10, col. 2 (Sup. Ct.). See text accompanying notes 69-74 *supra*.

185. *George Backer Mgt. Corp. v. Acme Quilting Co.*, 55 A.D.2d 535, 535, 389 N.Y.S.2d 111, 111 (1st Dep't 1976)(mem.), *appeal dismissed*, 40 N.Y.2d 1092 (1977); *New York Merchandise Co. v. 23rd Street Properties*, 49 A.D.2d 849, 850, 373 N.Y.S.2d 867, 869 (1st Dep't)(mem.), *motion for leave to appeal denied*, 38 N.Y.2d 707 (1975); *Graff v. Transitube*,

This is not to say that a court never will find a commercial lease provision unconscionable. Several decisions, already discussed,<sup>186</sup> have done just that. These decisions, however, all involved an unconscionable enforcement of a conscionable lease provision. Thus, courts appear reluctant to declare unconscionable the clauses themselves in commercial leases.

## VII. Unconscionability Claimed by Landlords

Like commercial tenants, landlords do not find the courts receptive to their arguments that certain lease clauses are unconscionable as applied to them. The factors which lead a court to hold for a tenant—unequal bargaining power<sup>187</sup> and a depressed housing market<sup>188</sup>—work against a landlord who claims unconscionability.

In *AWA Realty v. Storch*,<sup>189</sup> a clause in the lease allowed the tenant to cancel the lease upon thirty days' notice, without penalty. A new landlord purchased the property and asked the court to hold the clause unconscionable. Noting that the landlord had an opportunity to examine the lease before purchasing the property, the court found a clear case of *caveat emptor* and refused to hold the clause unconscionable.<sup>190</sup>

A court has held that the *lack* of a rent escalation clause in a long-term lease is not unconscionable.<sup>191</sup> However, in one case, a trial was ordered to decide if it was unconscionable for a tenant, who had obtained a stipulation in 1950 that the rent would remain at \$132.25

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Inc., 90 Misc. 2d 879, 882, 396 N.Y.S.2d 313, 314 (Civ. Ct. N.Y. 1977); *Graziano v. Tortora Agency, Inc.*, 78 Misc. 2d 1094, 1096, 359 N.Y.S.2d 489, 491 (Civ. Ct. N.Y. 1974); *Rich v. Don-Ron Trousers Corp.*, 74 Misc. 2d 259, 261, 343 N.Y.S.2d 684, 688 (Civ. Ct. N.Y. 1973). *But see* *Flam v. Herrmann*, 90 Misc. 2d 434, 436, 395 N.Y.S.2d 136, 137 (Civ. Ct. N.Y. 1977) (hearing ordered to determine if escalation clause is unconscionable).

Other commercial lease provisions which have been upheld include: no rent abatement if the property is damaged or destroyed, *Rodriguez v. Nachamie*, 57 A.D.2d 920, 395 N.Y.S.2d 51 (2d Dep't 1977) (mem.); electricity pass-along, *64 Univ. Place v. Samstein*, N.Y.L.J., June 13, 1978, at 10, col. 2 (Civ. Ct. N.Y.); requirement that a shopping center tenant become a member of and pay dues to an association of merchants in the center, *Moorestown Mgt., Inc. v. Moorestown Bookshop, Inc.*, 104 N.J. Super. 250, 249 A.2d 623 (1969); requirement that a tenant keep its store open for business during the full term of the lease, even where the tenant's business was no longer profitable, *J.J. Newberry Co. v. Mixon*, 440 F. Supp. 20 (E.D. Mo. 1977) (mem.); acceleration of entire rent due upon default in payment of month's rent, *Fifty States Mgt. Corp. v. Pioneer Auto Parks, Inc.*, No. 99 (N.Y. Ct. App. Mar. 29, 1979).

186. See cases cited in notes 126, 157, 163, 167 & 171 *supra*.

187. See text accompanying notes 75-83 *supra*.

188. See text accompanying notes 69-74 *supra*.

189. N.Y.L.J., Dec. 6, 1978, at 16, col. 5 (Sup. Ct.).

190. *Id.* at 16, col. 6.

191. 200 East Tenants Corp. v. Sherry, N.Y.L.J., May 10, 1978, at 11, col. 2 (Sup. Ct.).

a month, to sub-lease her apartment in 1976 for three years at a monthly rental of \$350.<sup>192</sup>

Though leasehold unconscionability is primarily a remedy for tenants, there may be some instances where landlords will benefit from it also. Courts, however, will require a greater showing of unconscionability from landlords than tenants.

### VIII. Possible Applications of Leasehold Unconscionability

There are three areas where courts should relieve tenants of over-reaching by landlords through the application of the doctrine of unconscionability: (1) jury trial waivers, (2) mitigation of damages, and (3) the use of form leases.

#### A. Jury Trial Waivers

The New York State Constitution guarantees a trial by jury in all cases where that right was guaranteed before the constitution was adopted.<sup>193</sup> Since the right to a jury trial in a summary proceeding to recover possession of real property antedated the state's constitution, it is constitutionally protected.<sup>194</sup> However, the constitution allows the parties to waive a jury trial in civil cases.<sup>195</sup> By statute in New York, the parties to a lease cannot waive a trial by jury in any action for personal injury or property damage.<sup>196</sup> Most leases, however, waive jury trials in all other actions.<sup>197</sup>

A tenant's waiver of the right to a jury trial in non-personal injury or property damage actions taken under the lease has been held valid and not unconscionable.<sup>198</sup> The validity of such a waiver, how-

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192. *Friedman v. Jordan*, N.Y.L.J., June 9, 1977, at 6, col. 1 (Sup. Ct.) *aff'd without opinion*, 60 A.D.2d 1008, 401 N.Y.S.2d 672 (1st Dep't 1970). On remand, the court held that the stipulation was not a lease, hence section 235-c did not apply. N.Y.L.J., Mar. 7, 1979, at 10, col. 3 (Supp. Ct.). However, since the stipulation required that the tenant remain in possession of the premises personally, the court held that the tenant could not sublet the apartment for a long term. *Id.* The court stated in dictum that, if the stipulation was read to convey to the tenant an unqualified life estate, the value of such an estate today would have no reasonable nexus to the amount agreed upon in the stipulation and, thus, the stipulation would be unconscionable under section 235-c. *Id.*

193. N.Y. CONST. art. 1, 2 (McKinney 1969).

194. 7 CARMODY & WAIT, CYCLOPEDIA OF NEW YORK PRACTICE § 49.26 (2d ed. 1965); N.Y. REAL PROP. ACTS § 745 (McKinney 1963).

195. N.Y. CONST. art. 1, § 2 (McKinney 1968).

196. N.Y. REAL PROP. LAW § 259-c (McKinney 1968).

197. See, e.g., Form Lease, *supra* note 90, cl. 29.

198. *Avenue Assocs., Inc. v. Buxbaum*, 83 Misc. 2d 719, 719, 373 N.Y.S.2d 814, 815 (App. T. 1st Dep't 1975) (*per curiam*); *Kaner v. Wood*, N.Y.L.J., June 8, 1976, at 10, col. 4 (Civ.

ever, was questioned in *Avenue Associates, Inc. v. Buxbaum*.<sup>199</sup> The trial court held a jury trial waiver unconscionable. The court stated that, given the housing shortage, "acquiescence in a complex lease hardly constitutes a knowing, freely contracted waiver of a constitutionally protected right. . . ." <sup>200</sup> The court held that a unilateral waiver by the tenant made the waiver unconscionable on its face.<sup>201</sup> On appeal, the appellate term reversed, stating only that a waiver of a jury trial in a lease is valid and binding except in an action for personal injury or property damage.<sup>202</sup>

Courts, however, should reconsider the constitutionality of jury trial waivers in light of United States Supreme Court decisions concerning waivers of constitutional rights. In *Fuentes v. Shevin*,<sup>203</sup> the Court held that a sales contract which stated the seller could take back the merchandise in the event of default of any payments by the buyer did not waive the buyer's due process rights to a full hearing before the merchandise was seized.<sup>204</sup> The Court noted the following factors concerning the transaction: (1) there was no bargaining over the contractual terms between the parties, (2) the bargaining power of the parties was unequal, (3) the waiver provision was a printed part of a form sales contract and a necessary condition for the sale, and (4) the seller did not prove the buyer was aware or made aware of the significance of the waiver. In a similar case, the Court upheld a confession of judgment clause because it was "voluntarily, intelligently, and knowingly" made.<sup>205</sup>

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Ct. N.Y.); *Schwartz v. Hillman*, N.Y.L.J., July 28, 1976, at 8, col. 3 (Civ. Ct. N.Y.).

A few decisions voided jury trial waivers which did not comply with N.Y. Civ. PRAC. § 4544 (McKinney Supp. 1978). Section 4544 states that a residential lease provision not clear and legible and less than eight points in depth may not be received into evidence in any trial, hearing or proceeding. *Koslowski v. Palmieri*, 414 N.Y.S.2d 599 (App. T. 2d Dep't 1979); *Sorbonne Apts. Co. v. Kranz*, 96 Misc. 2d 396, 398, 409 N.Y.S.2d 83, 84 (Civ. Ct. N.Y. 1978).

199. 83 Misc. 2d 134, 371 N.Y.S.2d 736 (Civ. Ct. N.Y.), *rev'd per curiam*, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (App. T. 1st Dep't 1975).

200. 83 Misc. 2d at 141, 371 N.Y.S.2d at 744.

201. *Id.* at 145, 371 N.Y.S.2d at 747.

202. 83 Misc. 2d 719, 373 N.Y.S.2d 814-15 (App. T. 1st Dep't 1975)(*per curiam*).

203. 407 U.S. 67, *rehearing denied*, 409 U.S. 902 (1972).

204. 407 U.S. at 96.

205. *Id.* at 95. See *Santiago v. McElroy*, 319 F. Supp. 284, 294 (E.D. Pa. 1970)(tenants signing form lease did not waive right to object on constitutional grounds to statutory distress procedure).

206. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972). The Court here upheld the cognovit because there was equal bargaining and no overreaching. *Id.* at 186. But the



The factors which impressed the Supreme Court in *Fuentes*<sup>207</sup> similarly should alert a court considering a jury trial waiver in a form lease. Although *Fuentes* involved a waiver of a federally-guaranteed right, the Supreme Court's reasoning is applicable to waivers of state-guaranteed rights. Given the great disparity in bargaining power between landlords and tenants, a jury trial waiver by a tenant should be suspect as unconscionable. The courts, however, have been strict in this area. They have held that since the tenant knowingly signed his lease, he will be bound to the waiver contained therein.<sup>208</sup> At least one court, however, ordered a hearing to determine whether the waiver was clearly, knowingly and intentionally made by the tenant.<sup>209</sup> Such a course is more in accord with the Supreme Court's warning that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."<sup>210</sup>

Tenants generally fare better with jury trials.<sup>211</sup> Since a landlord would rarely prefer a jury, while a tenant would rarely prefer a court, the apparent even-handedness of the waiver is misleading.<sup>212</sup> Therefore, section 235-c should be used to test the validity of the waivers.

## B. Mitigation of Damages

In a majority of jurisdictions, including New York,<sup>213</sup> the doctrine of mitigation of damages<sup>214</sup> does not apply to a contract of leasing.<sup>215</sup> A growing number of jurisdictions, however, disagrees<sup>216</sup> and the URLTA provides that a landlord must make reasonable efforts to

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Court warned that "where the contract is one of adhesion, [and] where there is great disparity in bargaining power, . . . other legal consequences may insue." *Id.* at 188.

207. See text accompanying note 205 *supra*.

208. *Schwartz v. Hillman*, N.Y.L.J., July 28, 1976, at 9, col. 3 (Civ. Ct. N.Y.); *Kaner v. Ward*, N.Y.L.J., June 8, 1976, at 10, col. 4 (Civ. Ct. N.Y.). See also *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248, 249, 298 N.Y.S.2d 847, 848 (App. T. 2d Dep't 1969) (per curiam).

209. *407-88 Assocs. v. Sawyer*, 83 Misc. 2d 300, 301, 371 N.Y.S.2d 748, 750 (Civ. Ct. N.Y. 1975).

210. *Aetna Insur. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

211. *Bentley*, *supra* note 63, at 855-56.

212. *Berger*, *supra* note 13, at 829.

213. *Becar v. Flues*, 64 N.Y. 518, 520 (1876); *Mack Kanner & Sons, Inc. v. Abramowitz*, 17 Misc. 2d 229, 230, 183 N.Y.S.2d 593, 595 (Sup. Ct. 1959).

214. See *J. CALAMARI & J. PERILLO, CONTRACTS* § 14-15 (2d ed. 1977).

215. See *Annot.*, 21 A.L.R.3d 534, 546-56 (1968).

216. *Id.* at 565-70. See *Bradbrook, The Application of the Principle of Mitigation of Damages to Landlord-Tenant Law*, 8 SYDNEY L. REV. 15 (1977).

rerent the premises at a fair rental.<sup>217</sup> Recognizing a duty to mitigate damages under a lease is more in keeping with the modern conception of a lease as a contract.<sup>218</sup>

Leases often include a provision that the landlord is under no duty to mitigate damages.<sup>219</sup> In *Lefrak v. Lambert*,<sup>220</sup> the trial court held such a clause unconscionable. The court stated:<sup>221</sup>

There is something basically unjust, basically unreasonable and, therefore, basically not legal about a landlord in an urban society with a housing shortage having no obligation to try to rerent an apartment and mitigate damages. There is something unfair about permitting tenants to be in a different category than other persons entering into a contract.

The court then held that the New York common law rule that landlords have no duty to mitigate should be reversed.<sup>222</sup> The court found, as a matter of law, that seventeen months was an unreasonable time for the apartment to remain vacant, absent proof that the landlord made a good faith effort to rerent.<sup>223</sup> The trial court limited the landlord's damages to three months rent.<sup>224</sup> On appeal, the appellate term modified the lower court's damage award and allowed the landlord to recover damages for the entire time the apartment remained vacant.<sup>225</sup> Since the evidence established reasonable and diligent efforts by the landlord to rerent, the appellate court ruled it was not necessary to decide whether a landlord must mitigate damages when a tenant vacates.<sup>226</sup>

There have been other judicial attempts in New York to change the rule concerning a landlord's duty to mitigate damages.<sup>227</sup> One court held that a landlord's refusal to rerent premises for nine

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217. URLTA § 4.203(c).

218. See notes 45-52 *supra* and accompanying text.

219. See, e.g., Form Lease, *supra* note 90, cls. 18(B) & 20.

220. 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct. N.Y. 1976), *aff'd as modified per curiam*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (App. T. 2d Dep't 1978).

221. 89 Misc. 2d at 205, 390 N.Y.S.2d at 965.

222. *Id.* at 203, 390 N.Y.S.2d at 964.

223. *Id.* at 200-01, 390 N.Y.S.2d at 961.

224. *Id.* at 205, 390 N.Y.S.2d at 965.

225. 93 Misc. 2d 632, 633, 403 N.Y.S.2d 397, 398 (App. T. 2d Dep't 1978).

226. *Id.*

227. *Gracie Towne House, Inc. v. Weinstein*, N.Y.L.J., March 14, 1973, at 17, col. 4 (App. T. 1st Dep't) (per curiam); *Douglas Manor House, Inc. v. Wohlfield*, 66 Misc. 2d 265, 266-67, 322 N.Y.S.2d 135, 137-38 (App. T. 1st Dep't 1970) (dissenting opinion); *Parkwood Realty Co. v. Marcaho*, 77 Misc. 2d 690, 692, 353 N.Y.S.2d 623, 625-26 (Civ. Ct. N.Y. 1974); *New York Univ. v. Nieto*, N.Y.L.J., Apr. 13, 1973, at 18, col. 4 (Civ. Ct. N.Y.). See Posner & Gallet, *Mitigation of Damages in Residential-Lease Breaches*, N.Y.L.J., Apr. 5, 1978, at 1, col. 2.

months is unconscionable conduct.<sup>228</sup> Another, while finding no duty to mitigate under a commercial lease, implied a possible duty under a residential one.<sup>229</sup> Although this trend towards modernizing the mitigation of damages rule has been noted,<sup>230</sup> neither the appellate courts<sup>231</sup> nor the legislature<sup>232</sup> has overturned the traditional New York rule.

As long as New York refuses to impose on the landlord a duty to mitigate damages, a lease clause stating that the landlord is under no obligation to reread cannot be held unconscionable. However, any unreasonable conduct in not mitigating could be held unconscionable under the court's equity powers since good faith dealings between landlords and tenants are now read into leases.<sup>233</sup>

### C. The Form Lease

Most residential landlords use a standard form lease.<sup>234</sup> Several courts have commented on the use of such leases.<sup>235</sup> As one court stated:<sup>236</sup>

From the most cursory examination of any of these residential lease forms, it is immediately apparent that they have been carefully, painstakingly designed to provide maximum protection for the landlords and to give only the most grudging minimal recognition to the reasonable expectations of residential tenants. Not one of these widely used forms comes close to representing a fair bargain. And yet it is a simple statement of facts that most people

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228. *Sherman Taylor Corp. v. Cohen*, N.Y.L.J., July 10, 1973, at 11, col. 1 (Civ. Ct. N.Y.).

229. *Twenty-One Assocs. v. Goldberg*, N.Y.L.J., July 6, 1977, at 10, col. 1 (Sup. Ct.).

230. *Birchwood Assocs. v. Stern*, 88 Misc. 2d 937, 938, 390 N.Y.S.2d 505, 506 (App. T. 2d Dep't 1976)(per curiam).

231. The appellate courts have avoided the issue. See *id.*; *Helmsley v. Anderson Clayton & Co.*, 60 A.D.2d 808, 808, 400 N.Y.S.2d 544, 545 (mem.), modified, 61 A.D.2d 957 (1st Dep't)(mem.), motion for leave to appeal denied, 44 N.Y.2d 641 (1978); *Howard Stores Corp. v. Robison Rayon Co.*, 36 A.D.2d 911, 911, 320 N.Y.S.2d 861, 862 (1st Dep't 1971)(mem.); *Lefrak v. Lambert*, 93 Misc. 2d 632, 633, 403 N.Y.S.2d 397, 398 (App. T. 2d Dep't 1978).

232. In 1976 and 1977, the New York State Assembly passed bills which would have made the landlord's duty to mitigate a statutory one. The bills were not passed by the state senate. Posner & Gallet, *Mitigation of Damages in Residential-Lease Breaches*, N.Y.L.J., Apr. 5, 1978, at 6, col. 3.

233. 57 E. 54 *Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 354, 335 N.Y.S.2d 872, 873 (App. T. 1st Dep't 1972). See URLTA § 1.302.

234. See note 63 *supra*.

235. *Santiago v. McElroy*, 319 F. Supp. 284, 294 (E.D. Pa. 1970); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 1000, 343 N.Y.S.2d 406, 411 (Civ. Ct. N.Y. 1973); *Galligan v. Arovitch*, 421 Pa. 301, 304, 319 A.2d 463, 465 (1966).

236. *Steinberg v. Carreras*, 74 Misc. 2d 32, 35, 344 N.Y.S.2d 136, 141-42 (Civ. Ct. N.Y. 1973), *rev'd per curiam*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (App. T. 1st Dep't 1974).

cannot rent apartments in this city [New York]—cannot in fact live here—unless they sign one of these printed-form leases.

Section 235-c allows a court to declare an entire lease unconscionable.<sup>237</sup> While no court has taken such action, at least one considered the possibility.<sup>238</sup> U.C.C. section 2-302 similarly allows for an entire contract to be held unconscionable<sup>239</sup> and such action has been taken under that section.<sup>240</sup>

Standard leases are generally long, complicated documents.<sup>241</sup> They are “simply grotesque in their one-sidedness,”<sup>242</sup> seldom revised, and fail to include duties imposed on the landlord by law.<sup>243</sup> One could question, therefore, whether a form lease is a contract at all since it cannot be regarded as the manifest consent of the tenant.

A contract may be oppressive taken as a whole, although no single term in itself is unconscionable.<sup>245</sup> The fact that form leases are adhesion contracts offered on a take-it-or-leave-it basis in a tight housing market<sup>246</sup> makes suspect their conscionability. In addition, since they normally contain clauses which have been held unconscionable<sup>247</sup> and clauses which border on the unconscionable,<sup>248</sup> form leases *in toto* could be declared unconscionable.<sup>249</sup>

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237. N.Y. REAL PROP. LAW § 235-c(1) (McKinney Supp. 1978).

238. Sorbonne Apts. Co. v. Kranz, 96 Misc. 2d 396, 397, 409 N.Y.S.2d 83, 84 (Civ. Ct. N.Y. 1978).

239. U.C.C. § 2-302, Comment 2.

240. State v. ITM, Inc., 52 Misc. 2d 39, 54, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966).

241. New York's “Plain English Law” requires that leases for residential space be written in a clear and coherent manner using words with common and everyday meaning. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1978). Because of this law, the Real Estate Board of New York revised its standard lease form. N.Y. Times, Jan. 19, 1979, at A15, col. 4.

242. Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 1000, 343 N.Y.S.2d 406 (Civ. Ct. N.Y. 1973).

243. Bentley, *supra* note 63, at 837, 850.

244. See Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 544 (1971).

245. RESTATEMENT (SECOND) OF CONTRACTS § 234 (Tent. Draft Nos. 1-7, 1972).

246. See text accompanying notes 60-83 *supra*.

247. See notes 90, 102, & 115 *supra*.

248. See notes 197 & 219 *supra*.

249. As a replacement for the landlord's form lease, states could mandate use of a statutory lease in all residential rentals. Such a bill was introduced into the New York Assembly in 1973 but it was not enacted. Assembly Bill 1513 (Jan. 16, 1973). For a discussion in favor of a statutory lease, see Kirby, *supra* note 63, at 235-37. For a discussion against a statutory lease, see Bentley, *supra* note 63, at 879-80.

### IX. Construing Section 235-c

In the almost three years since section 235-c was enacted into law, the New York courts have had to consider several issues in applying the statute, including: (1) whether the statute applies to oral leases, (2) whether the clause must be unconscionable when made, and (3) whether the statute requires a hearing on the issue of unconscionability.

#### A. Oral Leases

In *Valley Forge Village v. Anthony*,<sup>250</sup> tenants in a mobile home park sought to have their rent increases held unconscionable. The tenants had no written leases but leased the property under oral month-to-month tenancies. The court held that section 235-c does not apply to month-to-month tenancies.<sup>251</sup> The court, however, did not rule that the statute is inapplicable to oral leases, as has been suggested by one commentator.<sup>252</sup>

*Valley Forge* ruled that a lease, whether written or oral, is a prerequisite for the application of section 235-c<sup>253</sup> since the statute speaks of "a lease or any clause of the lease"<sup>254</sup> and since the statute is an addendum to another statute which similarly refers to a lease.<sup>255</sup> Because a month-to-month tenancy in New York is not treated as a leasehold relationship, such a tenancy is not a class of oral lease but a unique estate in property.<sup>256</sup> To be distinguished is the leasing of property for a single month, which is a situation where section 235-c would apply.

Thus, there can be no doubt that before a court can apply section 235-c, some type of lease must exist. Similarly, the U.C.C. unconscionability provision requires some type of contract. This does not mean oral leases or contracts are immune from the application of

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250. 92 Misc. 2d 1007, 401 N.Y.S.2d 978 (Suffolk Dist. Ct.) *aff'd per curiam*, 96 Misc. 2d 62, 409 N.Y.S.2d 957 (App. T. 2d Dep't 1978).

251. 92 Misc. 2d at 1009, 401 N.Y.S.2d at 980.

252. See Muldoon, *Unconscionable Lease Provisions*, 410 N.Y.S.2d No. 5, at 37 (Jan. 17, 1979).

253. 92 Misc. 2d at 1009, 401 N.Y.S.2d at 980. New York law requires that a lease of real property for a period longer than one year be in writing. N.Y. GEN. OBLIG. LAW § 5-703(2) (McKinney 1978).

254. N.Y. REAL PROP. LAW § 235-c(1) (McKinney Supp. 1978).

255. *Id.* § 235 (McKinney 1978).

256. 92 Misc. 2d at 1009, 401 N.Y.S.2d at 980.

257. *Id.* at 1010, 401 N.Y.S.2d at 980.

these statutes. Where a valid oral lease or contract exists, a court may hold it or any of its clauses unconscionable.

### B. Lease Unconscionable "When Made"

Section 235-c requires a court to find a lease unconscionable "at the time it was made."<sup>258</sup> Section 2-302 of the U.C.C. contains a similar requirement. The wording of the statute indicates that the lease or clause therein *itself* must be held unconscionable, not merely the *result* of the enforcement of the lease or clause.<sup>259</sup> In addition, it must have been unconscionable when it was made, not when it was breached or enforced.<sup>260</sup>

Thus, a court refused to grant a landlord's request to declare a lease unconscionable due to the lack of a rent escalation clause because when the lease was made, there was nothing unconscionable about the omission of the clause.<sup>261</sup> Similarly, section 235-c was held not to apply to a rent increase because the increase did not exist at the time of the making of the lease.<sup>262</sup> As a corollary to this, a court may not add a clause to a lease under section 235-c.<sup>263</sup>

### C. Necessity for a Hearing

When one of the parties under a lease claims that the lease is unconscionable, the question remains whether the court must order a hearing before it can pass on the issue of unconscionability. Section 235-c requires that, when a party makes such a claim, the parties be afforded "a reasonable opportunity to present evidence."<sup>264</sup>

Since the U.C.C. provision is similar, it is helpful to consider how the courts have construed its wording. Under the U.C.C., a hearing is mandatory once the court has accepted a *possibility* of uncon-

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258. N.Y. REAL PROP. LAW § 235-c(1) (McKinney Supp. 1978).

259. See text accompanying notes 172-74 *supra*.

260. See also cases construing U.C.C. § 2-302 on this point: *Jamestown Farmers Elev., Inc. v. General Mills, Inc.*, 413 F. Supp. 764, 772 (D.N.D. 1976), *rev'd on other grounds*, 552 F.2d 1285 (8th Cir. 1977); *Fairfield Lease Corp. v. Umberto*, 7 U.C.C. Rep. 1181, 1184 (Civ. Ct. N.Y. 1970).

261. *200 East Tenants Corp. v. Sherry*, N.Y.L.J., May 10, 1978, at 11, col. 2 (Sup. Ct.).

262. *Valley Forge Village v. Anthony*, 92 Misc. 2d 1007, 1010, 401 N.Y.S.2d 978, 980 (Suffolk Dist. Ct. 1978)(mem.).

263. *Beechwood Avenue Corp. v. Reborg Corp.*, N.Y.L.J., Nov. 28, 1977, at 13, col. 4 (App. T. 2d Dep't).

264. N.Y. REAL PROP. LAW § 235-c(2) (McKinney Supp. 1978).

scionability.<sup>265</sup> Thus, where the court saw the possibility of an unconscionable contract, a hearing was ordered.<sup>266</sup> Where no such possibility was seen, the necessity for a hearing was obviated.<sup>267</sup>

The courts which have considered this question under section 235-c are split on whether a hearing is mandatory or discretionary. Two courts ruled that a hearing was mandatory,<sup>268</sup> although one stated that the lease clause at issue did not appear to be unconscionable.<sup>269</sup> One court, however, refused to order a hearing since no basis existed for finding the clause involved unconscionable.<sup>270</sup> Given the courts' practice under the U.C.C. of mandating a hearing on the issue of unconscionability only when such a possibility appears to exist,<sup>271</sup> the court in the last case followed the correct procedure. If such a procedure were not followed, courts would be flooded with superfluous demands for hearings on unconscionability.<sup>272</sup>

## X. Conclusion

Leasehold unconscionability is a major addition to the battle against overreaching landlords. It is indicative, in a legal sense, of the contractual nature of the landlord-tenant relationship and, in a socio-political sense, of an awareness by courts and legislatures that tenants need to be protected from the capricious acts of landlords.

Now that courts are voiding leases or lease provisions as unconscionable, whether by statute or equity principles, tenants can es-

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265. ANDERSON'S UNIFORM COMMERCIAL CODE § 2-302:21 (2d ed. 1970).

266. *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17, 24, 304 N.Y.S.2d 918, 925 (4th Dep't 1969), *motion for leave to appeal denied*, 26 N.Y.2d 610 (1970); *Central Ohio Co-Operative Milk Producers, Inc. v. Rowland*, 29 Ohio App. 2d 236, 240, 281 N.E.2d 42, 44 (1972).

267. *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 499-500, 333 N.Y.S.2d 818, 823-24 (Sup. Ct. 1972); *Sinkoff Beverage Co. v. Joseph Schlitz Brewing Co.*, 51 Misc. 2d 446, 448, 273 N.Y.S.2d 364, 367 (Sup. Ct. 1966).

268. *Flam v. Herrmann*, 90 Misc. 2d 434, 436, 395 N.Y.S.2d 136, 137 (Civ. Ct. N.Y. 1977); *Edgemont Assocs. v. Skolnick*, 90 Misc. 2d 761, 764, 396 N.Y.S.2d 130, 132 (Town of Greenburgh Justice Ct. 1977).

269. *Edgemont Assocs. v. Skolnick*, 90 Misc. 2d 761, 763, 396 N.Y.S.2d 130, 132 (Town of Greenburgh Justice Ct. 1977).

270. *Graff v. Transitube, Inc.*, 90 Misc. 2d 879, 882, 396 N.Y.S.2d 313, 314 (Civ. Ct. N.Y. 1977).

271. See note 265 *supra* and accompanying text.

272. Some opponents of section 235-c argued that, since the statute mandated a hearing whenever a claim of unconscionability was made, the courts would be over-burdened. See New York State Bar Association Legislation Report No. 70, at 2 (1976). However, U.C.C. section 2-302 has not caused a significant increase in litigation. See Terry & Fauvre, *The Unconscionability Offense*, 4 GA. L. REV. 469, 496 (1970).

cape from a burdensome lease or unreasonable conduct by the landlord. The form lease—the most powerful weapon in the landlord's mighty arsenal—can be dismantled or even abolished by the application of the doctrine of leasehold unconscionability.

The doctrine, of course, is not perfect,<sup>273</sup> depending, as it does, on the varied moral judgments of the courts. What shocks the conscience of one court may not so offend another court.<sup>274</sup> Nevertheless, statutes such as section 235-c and URLTA 1.303 are giant steps forward in transforming the law from *caveat lessee* to *caveat lessor*. Tenants now can expect courts, particularly in New York,<sup>275</sup> to apply these statutes and the equitable doctrine of unconscionability against overreaching landlords and leases.

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273. For discussions of the problems with the theory of unconscionability, see Bradbrook, *The Law Relating to the Residential Landlord-Tenant Relationship: An Initial Study of the Need for Reform*, 9 MELBOURNE U. L. REV. 589, 594 (1974); Kirby, *supra* note 63, at 221-24.

274. Compare *Harwood v. Lincoln Square Apts. Sec. 5, Inc.*, 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (Civ. Ct. N.Y. 1974) with *Hausman v. Residential Funding Corp.*, 76 Misc. 2d 522, 351 N.Y.S.2d 265 (Civ. Ct. N.Y. 1973). See note 122 *supra*.

275. As of 1971, more cases were decided under U.C.C. § 2-302 in New York than in all the other Code jurisdictions combined. West, *Unconscionability: A State by State Survey*, 5 CLEARINGHOUSE REVIEW 61, 79 (1971).



